

1 UNITED STATES DISTRICT COURT
 2 FOR THE WESTERN DISTRICT OF NORTH CAROLINA
 3 (Asheville Division)

4 -----x
 5 SHIRLEY TETER, :
 6 Plaintiff, :
 7 :
 8 vs : Civil Action: 1:17-CV-256
 9 :
 10 :
 11 PROJECT VERITAS ACTION :
 12 FUND, ET AL, :
 13 Defendants. :
 14 -----x

15 Friday, May 3, 2019
 16 Asheville, North Carolina

17 The above-entitled action came on for a Final
 18 Pretrial Conference Hearing Proceeding before the
 19 HONORABLE MARTIN K. REIDINGER, United States District
 20 Judge, in Courtroom 3, commencing at 8:56 a.m.

21 **APPEARANCES:**

22 **On behalf of the Plaintiff:**

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30 **On behalf of the Defendants:**

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1 P R O C E E D I N G S

2 THE COURT: Good morning, everyone. We have one
3 matter that is on the calendar for today and that is
4 Teter versus Project Veritas which is on for a final
5 pretrial conference, as this case is on for the trial
6 calendar for the May term.

7 I recognize most of the attorneys but not quite
8 all. We have some new characters here today, so I'll
9 allow all the counsel who are participating to announce
10 their presence on the record.

11 MR. SASSER: Good morning, Your Honor, Jonathan
12 Sasser from Raleigh, with the firm of Ellis and Winters,
13 representing Ms. Teter.

14 MS. RINI: Preetha Rini, also with Ellis and
15 Winters, representing Ms. Teter.

16 MS. WELLS: Good morning, Your Honor. I'm Dixie
17 Wells from Ellis and Winters, as well, representing Ms.
18 Teter.

19 MR. STREZA: Good morning, Judge. I'm Ralph
20 Streza. I represent Ms. Teter also. I'm with the firm
21 Critchfield, Critchfield and Johnston, and I'm here from
22 Ohio.

23 MR. DEAN: Good morning, Your Honor. I'm Jamie
24 Dean and I represent the defendants.

25 MR. MONTECALVO: Good morning, Your Honor. Mike

1 Montecalvo; I also represent the defendants.

2 THE COURT: As far as -- can you all hear me?
3 Because I'm hearing this echo that is just terrible. Can
4 you still hear me?

5 MR. SASSER: Yes, sir.

6 THE COURT: Okay. Maybe that's going to be a
7 little bit better. If there had been a window, I would
8 have jumped out the window before the end of this if I
9 had to put up with that.

10 The entire objective of this proceeding today is
11 to sort of plan out how we're going to try this case. I
12 want to try to streamline the things that need to be done
13 of an administrative nature because, once we are trying
14 the case, it is my objective to have the jury in the jury
15 box literally eight hours a day until we're done.

16 So, for the first part of this, I want to go
17 through a number of the things that I need for all of you
18 to know about how I expect this case to go so that we can
19 plan accordingly and so that you can plan accordingly.
20 Then we'll move on to some other issues to where we have,
21 hopefully, a common understanding of how this case is
22 going to go forward so that we can all account for that
23 case in the manner it will be tried.

24 Let me start with the simple question to which I
25 never get the simple answer. And that is, how likely is

1 it that this case is going to try? Mr. Sasser, I'll
2 start with you.

3 MR. SASSER: Your Honor, based on our discussions
4 this week, it seems very, very likely.

5 THE COURT: Okay. Mr. Dean, Mr. Montecalvo, do
6 you have any different thoughts?

7 MR. DEAN: No, sir. I think it's a certainty.

8 THE COURT: Okay. The next question that I have
9 is, how long do you think it's going to take to try the
10 case? Before you answer that, let me give you a few
11 parameters to keep in mind. Because here, unlike in
12 superior court where they have other things going on on
13 the same days, we start every morning at 9 o'clock and we
14 go to 6:00 p.m. There's a one hour break for lunch. I
15 literally intend to have the jury in the jury box eight
16 hours a day until we're done.

17 Anything that needs to be done outside of the
18 presence of the jury, it would be my preference and my
19 intention of doing that either before 9 o'clock in the
20 morning, during the lunch break, or after 6:00 p.m. That
21 comes with the admonition that I give all lawyers who
22 come to try cases here, and that is: Bring your
23 crackers. Because I will assure the jury that they will
24 get the opportunity for lunch; I make no promises like
25 that for you.

1 Jurors already feel like you're wasting their
2 time. And if they feel like you're dragging it out by
3 letting them sit in the jury room for a couple hours and
4 that you do some stuff out of the presence of the jury,
5 and back and forth like that, they get really ticked off.
6 They don't get ticked off at me, they get ticked off at
7 the lawyers. So that's the schedule that I really don't
8 intend to deviate from if at all possible.

9 Another aspect of this that I want you to keep in
10 mind is you're in the first place on the trial calendar.
11 There's another civil case but they're behind you. That
12 means that when we start trying this case on Monday, the
13 20th, that Friday is the Friday of Memorial Day weekend.
14 I don't need to explain to you what impact that's going
15 to have on the jurors.

16 All of that having been said, what I'd like from
17 both sides is an estimate of how long is it going to take
18 to try the case, and how many witnesses do you expect you
19 are going to call? And, of that number of witnesses, how
20 many will be live? How many will be by deposition?

21 Mr. Sasser, I'll start with you.

22 MR. SASSER: Your Honor, I think we're going to
23 have two live witnesses and five or six videotaped
24 witnesses.

25 THE COURT: How long do you think the trial will

1 take?

2 MR. SASSER: I was going to say two days. I'm
3 not sure when we will -- the gun will be fired on Monday,
4 after jury selection. I think we will be -- certainly be
5 done by the end of the day Wednesday.

6 THE COURT: With your case?

7 MR. SASSER: Yes, sir, with my case.

8 THE COURT: Do you have an estimate of how long
9 the trial is going to take?

10 MR. SASSER: I don't know for their side of the
11 case how long they're going to take. But I still think,
12 as we said at summary judgment hearing, four to five days
13 for everything.

14 THE COURT: So you have two live witnesses but
15 five on video?

16 MR. SASSER: As many as five, Your Honor. Five
17 or six.

18 THE COURT: Well since you have them, so to speak,
19 "in the can," you should have a real good idea of how
20 long that part of the presentation is going to take.

21 MR. SASSER: I would if I knew the rulings on
22 certain motions in limine and designations of
23 depositions, and that way I could certainly compact them.
24 But some of that's still up in the air. We're not going
25 to be able to cut them until --

1 THE COURT: I understand that. But are the
2 potential cuts so great that you don't have an estimate
3 of, you know, a two-hour deposition with the cuts comes
4 to one hour and 50 minutes or comes to ten minutes?

5 MR. SASSER: I'm sorry, Your Honor, I do not have
6 that estimate at this point. I do not intend on putting
7 any one witness on the video for more than two hours, and
8 probably less than that.

9 THE COURT: I can't say that I've ever had a trial
10 where five out of seven witnesses were by deposition. I
11 don't think jurors like that very much. That's a kind of
12 risky way of proceeding, but your case is what your case
13 is.

14 MR. SASSER: I understand, Your Honor.

15 THE COURT: Okay. Very good.

16 MR. SASSER: They're from out of state.

17 THE COURT: Mr. Dean, what are your thoughts?

18 MR. DEAN: Your Honor, the same as the plaintiff
19 in that some of the number of witnesses depends on the
20 Court's rulings today. We could have as many as seven, I
21 think, live witnesses. Many of them will be very short.
22 I think some of them will be less than maybe even an
23 hour. We will have two witnesses by deposition, and each
24 of those depositions is less than an hour and a half. I
25 think that the original estimate that -- even including

1 jury selection is that we can be completed, given the
2 Court's parameters, by close of business on Thursday with
3 the presentation, is what we're shooting for, and I
4 believe that can happen.

5 THE COURT: So, roughly, with the idea of getting
6 the case to the jury maybe on Friday morning?

7 MR. SASSER: Yes, sir.

8 MR. DEAN: Yes, Your Honor.

9 THE COURT: Okay. As I mentioned earlier, you are
10 on a trial calendar with one other case. We'll pick both
11 juries on the morning of the 20th, on that Monday
12 morning. Since the other case is second we will pick
13 their jury first. Once that jury is picked then I'll
14 release that jury to the following week, I'll release the
15 parties in that other case until the following week, and
16 then we'll pick your jury and go straight from your jury
17 selection in to the presentation of the evidence.
18 We'll get to the method of jury selection in a few
19 minutes. I would certainly propose to have both juries
20 selected before we take the lunch break on Monday.

21 The next broad topic that I want to address is the
22 manner of presentation. The first topic there concerns
23 the presentation of exhibits to the jury. Well
24 presentation of exhibits in general, including
25 presentation to the jury. Upstairs, I'm sure you noticed

1 at the summary judgment hearing that we have an
2 electronic system for presenting exhibits. Back in the
3 old days, when I was trying lawsuits, and you had the
4 paper copy, and you asked to approach the witness, and
5 you walked up to the witness stand and hand it to the
6 witness. You don't do that anymore. That burns an awful
7 lot of time.

8 There is a system for displaying an exhibit to the
9 Court and witness. Then if something is admitted and is
10 to be published to the jury there's a means by which it
11 can be published to the jury. There are very few
12 situations in which anybody needs to be approaching the
13 witness. This isn't a criminal gun case. You don't have
14 to take the gun up to the officer or anything like that.
15 Use of the electronic equipment is mandatory -- it's not
16 optional -- because it saves us an awful lot of time.

17 If you need any sort of tutorial on the use of
18 that equipment, please talk to the clerk about arranging
19 a time to get that tutorial, whether it is today or one
20 day next week. It will need to be either today or next
21 week, because the following week there will probably be
22 no one here from the clerk's office to assist you with
23 that; and then the following Monday is when we start the
24 trial.

25 Please make sure that all electronic equipment

1 that you are planning to use to connect to the system is
2 compatible with the system. I have had it happen before
3 that the attorney comes for his tutorial, he hooks up a
4 laptop, and all of the exhibits transfer just fine. He
5 shows up for trial with a different laptop, he connects
6 it, and then when we pushes "play" for the video nothing
7 happens. We're not stopping for that. It's your
8 responsibility to make sure it's all compatible; to make
9 sure it all works. So please keep that in mind.

10 The next topic that I want to address with you
11 pertains to opening statements and closing arguments. I
12 believe that all of you are probably experienced enough
13 to know that jurors completely discount everything you
14 say. They want to hear the story from the witnesses.
15 For that reason, I generally limit, in civil cases, each
16 side to an opening statement of ten minutes. Closing
17 arguments for a case as long as what we're talking about
18 here? Maybe 30 minutes to a side.

19 Do any of you feel that those parameters are not
20 realistic in light of the specifics of this lawsuit.

21 MR. SASSER: No, Your Honor.

22 MR. DEAN: No, sir, Your Honor.

23 THE COURT: If something does come up to where we
24 need to revisit that, regarding closing arguments, we can
25 do that at the charge conference. But I want you all to

1 understand at the front end that those are generally my
2 expectations.

3 The next thing that I wanted to address regarding
4 the presentation of the case is the issue of
5 stipulations. I noticed you-all filed some very
6 extensive stipulations, but what you filed left me
7 uncertain as to how you were planning to present this.
8 Because it seemed like an awful lot of what you have in
9 the stipulations is what you're going to be presenting
10 through your witnesses or, at least, what I would have
11 been expecting you would be presenting through your
12 witnesses.

13 So is this just a list of the things that are not
14 in dispute, or is this actually a set of stipulations
15 that the parties are intending for either the Court or
16 one of the attorneys to read to the jury during the
17 course of the trial?

18 MR. SASSER: Your Honor, it's my usual experience
19 that the judge would read those in. I realize some are
20 specific and they will be covered, and I don't want to
21 duplicate anything. So I think that it may depend on a
22 particular stipulation as to whether we would want the
23 Court to start out reading them in or reading them in at
24 the start of the defense case some of them.

25 THE COURT: Okay. The very last thing you said

1 puzzles me. Because if it's at the start of the defense
2 case that means the plaintiff has rested; you're past the
3 Rule 50 motions. So are you telling me these
4 stipulations have nothing to do with any element of your
5 case?

6 MR. SASSER: No, Your Honor.

7 THE COURT: Okay.

8 MR. SASSER: Just that they may come in at the
9 appropriate time. Definitely, we want them in before the
10 directed verdict motion.

11 THE COURT: Okay. With regard to stipulations
12 though. First of all, the general rule is that for the
13 presentation of stipulations whatever you-all agree to as
14 to how to present them is fine with me. If you -- if
15 plaintiff's counsel is going to read them, and you agree
16 to that, that's fine. If defense counsel is going to
17 read them, and you agree to that, that's fine.

18 The default is that if you don't agree as to how
19 this stipulations will be presented then I will read the
20 stipulations when plaintiff's counsel tells me that other
21 than the stipulations the plaintiff has no further
22 evidence. In other words, the very last thing before the
23 plaintiff rests is they will be read by me unless you
24 stipulate or agree to something else.

25 Because of what you were just saying a moment ago,

1 Mr. Sasser, about these stipulations and not wanting to
2 duplicate things. As we go through the plaintiff's case,
3 if you are wanting to winnow down that list of
4 stipulations to where at the end of plaintiff's case you
5 only want me to read stipulations 30 through 38. So long
6 as you let me know, I'm glad to do that. But, other than
7 that, I don't have any way of knowing. I'm not going to
8 go through and check off, well, witness one got items
9 three, four and five in. And I can't keep up with that
10 and everything else.

11 MR. SASSER: We will keep up with that, Your
12 Honor.

13 THE COURT: Okay.

14 The next issue regards exhibits, stipulations
15 regarding authenticity of exhibits, and exhibit lists,
16 and exhibit notebooks. So it pertains to stipulations;
17 it also pertains to exhibits in general. There's a
18 particular format for exhibit lists that's in The Case
19 Management Order. Please follow that. And in there,
20 there is a -- one of the columns is with regard to
21 whether there are stipulations or agreements about either
22 authenticity, admissibility, et cetera.

23 The way I do it with exhibits -- because I think
24 it's a waste of time to read to the jury for each
25 exhibit. There is a stipulation as to authenticity.

1 There's a stipulation as to admissibility. The way it
2 will work is, even if you have stipulated, when
3 Mr. Sasser has examined the witness about Exhibit 10, it
4 has been authenticated, and it's -- or there's a
5 stipulation as to the authenticity, and Mr. Sasser says
6 the plaintiff will offer Plaintiff's Exhibit 10, I will
7 still ask if there is any objection. If there is no
8 objection, it will be admitted. It just becomes a nice
9 little routine for getting in the exhibits. It becomes
10 very efficient for doing it that way, notwithstanding
11 having the stipulation, but any stipulation will not be
12 read.

13 With regard to exhibits that are presented during
14 video deposition testimony. How do you propose to do
15 that? If you have the witness on the screens for the
16 jury, how do you propose to display the exhibits to the
17 witness -- to the jury?

18 MR. SASSER: Your Honor, I think we'll be able to
19 do that through a split screen. If not, we will figure
20 something out. The one concern I have is that something
21 may be Exhibit 14 at the trial; it was the same document
22 was Exhibit 3 in Mr. O'Keefe's deposition; Exhibit 2 in
23 somebody else's deposition. So we're going to have to
24 figure out a way to make sure that the jury knows we're
25 talking about the exhibit that's before them and that

1 that's exactly who the witness is talking about.

2 THE COURT: Yeah. That presents some real
3 logistical problems. I urge you to try to figure out a
4 way to work that out ahead of time. I have no idea
5 whether you have the expectation that these videos were
6 going to be used at trial. Obviously, if you know ahead
7 of time, the easy way to do that is you have sequential.
8 Numbers. In other words, Exhibits 1 through 5 are the
9 first deposition; 6 through 25 are the second deposition,
10 and so on. But that's water over the dam.

11 MR. SASSER: Yes, sir.

12 THE COURT: Some things about exhibit notebooks
13 and exhibit lists that I want to -- it's not really an
14 admonition. There are some things I don't want you to
15 do. And I say that based on what I've had other attorneys
16 do, and it's a pain in the neck. First of all, when
17 you're about to try a case, you have a pretty good idea
18 of what exhibits you're going to use and what exhibits
19 you're not going to use. So if there are these 20
20 exhibits that you're pretty certain that you're going to
21 use, and that's pretty much your case, please do not give
22 me an exhibit list that has 150 exhibits listed on it.
23 By the same token, if you expect that there are going to
24 be a hundred exhibits that you're going to use, please
25 don't give me an exhibit list that has 20 of them listed.

1 If you need to add two or three exhibits during
2 the course of the trial -- I mean, we've all had that
3 experience that there was some document that you found in
4 discovery that you really didn't think was going to be
5 all that important, and on the second day of trial it
6 suddenly becomes very important. You can add it to the
7 list. That's not a problem. When you start doing that
8 over and over and over again, it's a problem.

9 Please don't do what I had one lawyer do in a
10 trial that we had about three years ago. He showed up
11 for trial, I kid you not, with 23 bankers' boxes of the
12 exhibits. He had an exhibit list that went for -- I
13 forget what it was -- 400 exhibits. During the course of
14 the trial, of those 400 exhibits he used about 40; and he
15 added another 60 to the list during the course of the
16 trial. By the end of that trial I had no idea what was
17 in evidence and what wasn't. My document management was
18 out the window. That becomes impossible to manage. So
19 please do not do anything like that.

20 Also, do not have a catch-all exhibit. I've had a
21 lawyer do this before. He had those 60 exhibits that he
22 thought that he was going to put into evidence, and then
23 Exhibit 61 was, I think, quite literally everything else
24 that had been produced in discovery. It was a notebook
25 all by itself. And in the middle of trial he says I

1 would like to offer into evidence Exhibit Number 61, page
2 122, or whatever it was, and he wanted to examine the
3 witness about. By the time you take a 400- or 500-page
4 exhibit, load it into the system, scroll down to page
5 122, and get it on the screen, the jury's asleep, and
6 you've probably overloaded the system. I mean it will
7 take forever. So that just doesn't work. I'd rather you
8 keep that entire stack in your briefcase. And when you
9 need page 122 you pull it out, you put an exhibit sticker
10 on it making it new Plaintiff's Exhibit 61, and then you
11 go forward from there.

12 Are there any questions about what I'm talking
13 about regarding the presentation of exhibits.

14 MR. STREZA: Judge, may I ask a question?

15 THE COURT: Please.

16 MR. STREZA: In several of the depositions the
17 witnesses have been shown short video clips and have been
18 asked to comment on the content of the video clips. How
19 would the Court allow us to present those video clips,
20 especially when we're showing the video depositions of
21 those witnesses.

22 THE COURT: Well I don't see how that's really any
23 different from any other exhibit that you're planning to
24 display to the jury. Whatever means you are intending to
25 use to display an exhibit to the jury in the middle of a

1 video deposition is what I would suggest that you use for
2 that. And I've seen it done two different ways. One is
3 what Mr. Sasser mentioned earlier, a split screen. And
4 the other one that I've seen is that the exhibit
5 supplants the visage of the deponent for that five
6 seconds, or whatever it is, on the screen, and the video
7 is edited in that manner. Either of those would be
8 acceptable.

9 MR. STREZA: Thank you.

10 THE COURT: Any other questions about the
11 presentation of exhibits? Again, this is all for making
12 it an efficient presentation to the jury.

13 One thing I want to note with regard to the
14 exhibit notebooks. Again, I should have looked before we
15 started today whether you got the old version of the Case
16 Management Order or the new version. The old version
17 says you have to bring four copies of the exhibit
18 notebooks. If that's what you got, I'm amending that
19 right now. You only need to bring two. One copy of all
20 the exhibits that are on your exhibit list you need to
21 present to the Court before we get started. That's my
22 copy so that in the event that I need to be referring to
23 an exhibit that you're not displaying on the electronic
24 system that I have a copy of it there at the bench.

25 The second copy, the second notebook, is what I

1 refer to as your insurance policy. Because if everything
2 else breaks down there are document cameras, one on each
3 counsel table. We have never run into the problem of
4 those not working. So that if you cannot present the
5 exhibits any other way you can take that hard copy out of
6 your insurance policy notebook, you can put it on the
7 tray with the dot cam, and then you can show it to the
8 witness, you can show it to the Court, and if it's
9 admitted you can show it to the jury. So that's all you
10 need. You don't need the additional copies. That's
11 presuming, of course, that you've exchanged copies of the
12 exhibits which you're supposed to have done anyway. I'm
13 not counting the exchanged copies. That's your
14 responsibility to get done. So any questions about that
15 issue? Mr. Sasser.

16 MR. SASSER: Yes, sir. More as to depositions
17 than exhibits. If I have a five-minute video to show of
18 one particular witness and their cross-examination would
19 be 45 minutes, how do we work that out? Do they need to
20 play theirs in their case, or do they play theirs with
21 mine? How does that --

22 THE COURT: Maybe I don't understand your
23 question. The rule of completeness is that if you're
24 presenting a portion of a deposition in lieu of live
25 testimony then everything regarding that deposition comes

1 in at that time. Using your example. If you have a
2 video deposition where you want to put in five minutes
3 but they want to put in an hour. If you are wanting to
4 put in that five minutes as part of your presentation,
5 then the hour -- I mean the five minutes plus the hour
6 come in at that time, and it comes in in the order that
7 it was done at the deposition.

8 MR. SASSER: Thank you, Your Honor.

9 THE COURT: Anything else with regard to exhibits,
10 exhibit notebooks, exhibit lists, or any of that? Okay.

11 The next issue that I want to turn to is jury
12 selection. I can't remember whether this is in your
13 supplemental case management order or whether we emailed
14 it to you, or maybe neither. I want to make sure that we
15 are of a common understanding as to how jury selection
16 will proceed. We use the "mandatory strike" method,
17 which I know that the Administrative Office of the
18 federal courts in Washington would like all federal
19 courts to use but I understand that not all do. If
20 you're in federal court often you're probably familiar
21 with this system.

22 In short, when we call in the jury pool for this
23 case, we will then have 14 people who are selected at
24 random who we'll put in the jury box. Of those 14, I
25 will conduct a voir dire. After I conduct a voir dire

1 then plaintiff's counsel will have an opportunity to voir
2 dire the 14 for approximately 20 minutes. That's not 20
3 minutes per juror; that's 20 minutes for the panel.
4 After that, defense counsel will have the opportunity to
5 voir dire the 14 for approximately 20 minutes.

6 At the end of that period you will have the
7 opportunity to make challenges for cause at the bench.
8 Any jurors who are excluded for cause, or stricken for
9 cause, will be replaced by new people from the jury pool
10 and we'll repeat this process but only as to the new
11 members of the jury pool -- of the jury panel.

12 So, for instance, if we call up 14 at the end of
13 that process and there are two that are stricken for
14 cause we'll call two new jurors into those two seats. I
15 will then voir dire the two new jurors, the plaintiff's
16 counsel will have an opportunity to voir dire those two
17 new jurors for approximately two minutes each -- so
18 probably four minutes -- defense counsel will get
19 approximately four minutes, and then you'll get an
20 opportunity to challenge for cause those two. You don't
21 get to go back to the other 12. I realize that's very
22 different from what you do in superior court but it's
23 much more efficient as well.

24 Once we have 14 people in the box who have not
25 been stricken for cause then both sides have to exercise

1 all of their peremptory challenges. I will say, for
2 instance: Mr. Sasser, what says the plaintiff as to the
3 exercise of her first peremptory challenge? You would
4 say, the plaintiff thanks and excuses Juror 2, Ms. Smith.
5 I'd say, Mr. Dean, what says the defendants as to the
6 exercise of their first peremptory challenge? He will
7 say, we excuse Juror 14, Mr. Jones.

8 Each side has three peremptories; you have to use
9 all three. Please don't do what I've had other attorneys
10 do after they've used one and they stand up and say
11 plaintiff is satisfied with the jury. No. It's called
12 "mandatory strike" because you have to use all three
13 peremptory strikes. Simple math. You start with 14,
14 plaintiff strikes three, defendant strikes three; you end
15 up with eight. The eight are your jury.

16 We don't have alternates because with a civil case
17 they can have a verdict all the way down to six. So if
18 we lose one juror in the middle of trial we will continue
19 with a jury of seven. If we lose two jurors in the
20 middle of trial we will continue with a jury of six. And
21 I've had it happen one time. If you lose three jurors in
22 the middle of trial we can only continue with a jury of
23 five by the stipulation of the parties. I never thought
24 that would ever happen but it happened once so I mention
25 it.

1 Any questions about the jury selection method that
2 we're going to use for selecting the jury in this case?

3 MR. DEAN: Your Honor, could I ask a related
4 question about the jury?

5 THE COURT: Yes.

6 MR. DEAN: What, if any, information will we be
7 allowed to glean about the jurors before we arrive to
8 court on May 20th?

9 THE COURT: Well that's a good question. As of
10 right now, I don't have an answer for you. Here's the
11 issue. We have a fairly large number of jurors who have
12 been summoned for this term. In fact, I believe we had
13 something like 500 maybe, or maybe even 600 jury
14 summonses that went out. Some subset of that -- in fact,
15 a relatively small subset of that will be randomly
16 selected on, what is it, Friday, the 17th to come in on
17 Monday, the 20th? So I think that there may be some
18 information available next week about the 500 but not
19 about the ones who will actually be in the jury pool that
20 morning. I don't know if that helps you any.

21 MR. DEAN: As to the subset that's randomly
22 selected. Is that something that we can learn on the
23 17th, or is that only information we can learn on the
24 20th?

25 THE COURT: I think the answer is that it would be

1 available on the 17th, but I'm not directly involved in
2 that whole process. And when I say "available on the
3 17th," I don't mean at 9 o'clock in the morning. I mean
4 quite late in the day. One of the reasons that I
5 hesitate is I happen to know that there's not going to be
6 anybody in the clerk's office on Friday, the 17th,
7 because that's the day of -- during that week is our
8 district meeting. So I don't want to make you any
9 promises that I can't keep.

10 I guess the best answer is inquire further and
11 hopefully I'll know more. The person to contact would be
12 my career law clerk, Ms. Ritter, and she can -- she'll
13 have information for you to update that.

14 MR. DEAN: Thank you, sir.

15 THE COURT: Anything else with regard to jury
16 selection? The next thing -- I mean that covers, kind
17 of, the issues having to do with how the trial will be
18 conducted and all of those logistical problems.

19 From here I wanted to turn more to the things that
20 are specific to this case. So if there are any issues
21 that you want to talk about regarding trial logistics now
22 would be the time.

23 MR. SASSER: Your Honor, what courtroom will we
24 be in if Your Honor knows at this point.

25 THE COURT: Oh. Well there's really only one

1 courtroom in this building with a usable jury box and
2 that's the one where we were for the summary judgment
3 hearing.

4 MR. SASSER: Thank you, Your Honor.

5 And there's an issue about a witness who has a
6 conflict. I think there was a motion pending on the -- a
7 consent motion pending on that.

8 THE COURT: Well, yeah, that was something
9 specific to this -- to the trial so -- but we'll get
10 there. That's here on my list.

11 One thing that I didn't mention, and in light of
12 what you said earlier it's probably irrelevant. But in
13 the event that you somehow settle this case there are a
14 few rules that we have because of the system that we use
15 concerning bringing in jurors and how expensive juries
16 are. If you settle the case, settle the case by noon on
17 the 17th, the Friday before the trial, you have to not
18 only inform the court that you have settled the case but
19 you also have to file with the court -- and you can file
20 it under seal. But you have to file what I refer to as a
21 "term sheet." It is a sufficient description of the
22 terms of your settlement such that, if necessary, the
23 Court can enter a judgment based on that settlement
24 agreement. It has to be signed by the attorneys. Both
25 of you seem certain that you will not settle the case,

1 but I've heard that before in cases that settled, so I
2 mention that for what it's worth.

3 Now does that mean that you are prohibited from
4 settling the case after noon on the Friday before?

5 Obviously, the answer is no. It's just that you will get
6 tagged with the jury costs. Bringing in a jury pool like
7 that, and the additional portion of the jury pool for a
8 case like this, you're probably looking at something
9 like, I don't know, \$4,500, \$5,000. Juries are not
10 cheap. And they're less cheap around here because we
11 have jurors coming from so far and we have to pay their
12 mileage, and for a lot of them we have to pay their
13 lodging.

14 Okay. Anything else that we need to address
15 before we move on to things that are directly related to
16 this action?

17 The next thing that I want to turn to is what the
18 verdict sheet is going to look like. I was a little bit
19 puzzled by what had been submitted with all of these
20 essentially factual interrogatories. As you're probably
21 aware, the North Carolina Pattern Jury Instructions with
22 regard to defamation do not propose submitting a
23 defamation claim on anything like that. In fact, if we
24 follow the pattern jury instructions approach the verdict
25 sheet would really consist of three issues.

1 The first one, essentially, is did the defendants
2 defame the plaintiff? And I'll come back to that issue
3 in a moment. And then two: If yes, what amount of
4 compensatory damages, if any, is the plaintiff entitled
5 to recover from the defendants? Then they fill in the
6 blank. Three is the same sort of thing with punitives.

7 With regard to the first issue, the defamation
8 issue. In looking into this more carefully I think that
9 there is a determination as a matter of law that the
10 Court is required -- is called on to make that says, did
11 the defendants defame the plaintiff by the following
12 statement or the following implied statement. Let me
13 hear your thoughts about proceeding in that manner,
14 whichever side wants to go first.

15 MS. WELLS: Your Honor, we generally try to track
16 the pattern jury instructions. At defendant's request,
17 we separated out actual malice for the person -- for the
18 public figure instructions. But, certainly, the
19 plaintiffs would have no objection to going back to the
20 pattern jury instructions with -- let me raise one point
21 though. With the per se -- I believe it was with the per
22 se private figure, the pattern jury instructions have a
23 part one question and a part two question.

24 THE COURT: All of a sudden the sound system went
25 out and I had trouble hearing you.

1 MS. WELLS: I'll speak up, Your Honor. The
2 pattern jury instructions have a part one and a part two,
3 and the parties agree that it just seemed easier to
4 separate those out as questions rather than having one
5 question with different parts. So I'll let defendant
6 speak as well.

7 THE COURT: Okay. Mr. Dean.

8 MR. DEAN: Yes, sir. What has been proposed on
9 the verdict sheet are the issues taken from the pattern
10 instructions in terms of, did the defendant defame the
11 plaintiff? And, then, if so what amount of actual
12 damages and, if appropriate, what amount of punitive
13 damages. We did propose a separate instruction for
14 actual malice, really, for two reasons.

15 One is because it's subject to a different burden
16 of proof. It's subject to the clear and convincing
17 standard. Whereas, the other elements of defamation are
18 subject to a did not know or failed to use ordinary care
19 standard or, I'm sorry, preponderance of the evidence
20 standard. And, so, Your Honor, we thought that the
21 distinction there between the two burdens of proof made
22 it appropriate to separate out that element from the
23 others.

24 I believe both sides also -- although I haven't
25 had an opportunity to review the plaintiff's proposed

1 jury instructions at this time. Both sides, I believe,
2 have added to or proposed revisions to what the pattern
3 uses for actual malice to incorporate the Supreme Court
4 and Fourth Circuit jurisprudence on that issue. So, in
5 terms of the questions, we have tried to track with that
6 one exception.

7 To your question. We do agree, Your Honor, that
8 the case should be submitted following the pattern
9 instruction. It says -- asks whether the defendant
10 defamed the plaintiff by asserting specific statements.
11 And we do believe that those specific statements should
12 be articulated for the jury. And where it is the Court's
13 determination as to whether the statements are per se,
14 the court makes that call. Obviously, if the Court
15 determines a statement is not defamation per se then it's
16 up to the jury.

17 But we do think it should be on specific
18 statements rather than just simply saying, did video one
19 defame the plaintiff? Did video two defame the
20 plaintiff? And we would ask Your Honor that that's
21 something that the parties crystallize -- really, that
22 plaintiff crystallize in advance of trial so we know
23 which statements are at issue.

24 THE COURT: Let me stop you there for a second.
25 Hasn't the plaintiff already done that by particularly

1 crystallizing the alleged defamatory elements by the way
2 it's been alleged in the complaint.

3 MR. DEAN: That's what we argued at summary
4 judgment, Your Honor. And, certainly, we believed at
5 summary judgment that the statements were those that were
6 alleged in the complaint. There was some disagreement
7 from the plaintiff about that, and there was extensive
8 discussions about what the statements were at summary
9 judgment.

10 And I believe that some of the statements also --
11 there were concessions during summary judgment aren't
12 defamatory. So the statement alone that Mr. Foval said
13 Ms. Teter is a trained bird-dogger. I believe they
14 conceded that statement on its own was not defamatory,
15 but they said there was some implied meaning elsewhere.

16 I agree with Your Honor that it should be limited
17 to the statements articulated in the complaint, but I
18 don't think -- I don't believe that's been the consistent
19 position on the other side. From our vantage, we would
20 like to know what the specific statements are in order to
21 be able to prepare for trial.

22 THE COURT: Ms. Wells, I'll hear from you. I've
23 already said my understanding is that you are -- you are
24 whetted to what you've alleged in the complaint. Maybe
25 not the precise wording, but certainly in terms of the

1 substance of what you've alleged in the complaint as
2 being the particular express or implied statements that
3 would be submitted to the jury as the alleged defamatory
4 statements. Do you disagree with that?

5 MS. WELLS: I do not disagree with that, Your
6 Honor. And if you look at our complaint. In Count One
7 it alleges defamation, libel, and slander. It says the
8 defendants made false, misleading, and defamatory written
9 and verbal statements of or concerning Ms. Teter in
10 video one and video two, which were published to third
11 persons, causing injury to Ms. Teter's reputation.

12 It's our position that we did allege that the
13 entirety of video one and the entirety of video two are
14 the statements that are at issue. Your Honor, I would
15 further say, it's looking at the entire statement that
16 gives the meaning of those statements rather than picking
17 out parts of those.

18 THE COURT: Mr. Dean, do you want to respond to
19 that?

20 MR. DEAN: Well, obviously, I disagree, Your
21 Honor. The pattern instruction says that do we defame by
22 making certain statements? Video one is a 16-minute
23 video. I don't know how the jury can be asked to opine
24 if we simply said in the jury instructions, did video one
25 defame the plaintiff? How are they supposed to ferret

1 out things like falsity of an accusation when only a
2 small portion of the video relates to Ms. Teter? You
3 can certainly look at the context of the video without
4 saying that the entirety is a defamatory statement.

5 I think the example I would point the Court to is
6 the *Renwick versus Greensboro News* case that we've talked
7 about extensively, Your Honor, the North Carolina Supreme
8 Court case that talks about multiple interpretations.
9 There the court looked at whether the whole article in
10 that case made the implied statements that the plaintiff
11 alleged. So it's really apples to oranges to say you
12 have to look at the whole statement, thus the whole
13 publication and, thus, the whole publication is the
14 statement.

15 I think what is true is you have to identify in
16 what specific way the publication defames you. And then
17 the court, in terms of defamation per se, looks at the
18 entire publication to see if the entire publication, or
19 context of the publication within its four corners
20 actually makes that statement. So I do believe, again,
21 Your Honor, that there should be specific statements not
22 simply asking the jury to opine on whether the entirety
23 of video one and the entirety of video two is defamatory.

24 THE COURT: With that, Ms. Wells, I want to turn
25 back to you, because here is why I don't understand your

1 argument at all. The paragraph that you were referring
2 to in the complaint, paragraph 64, talks -- says the
3 defendants made false, misleading, and defamatory written
4 and verbal statements of or concerning Ms. Teter in
5 video one and video two. It doesn't say the videos are
6 defamatory. It says the defamation is contained in.

7 And then in the very next paragraph you say the
8 defendant's statements are false and misleading by their
9 suggestion that Ms. Teter is homeless and suffers from
10 mental illness. And then you give another one with
11 regard to being a paid political activist sent to provoke
12 violence. That's what you've alleged as the defamatory
13 statements, and that's what I foresee at least being
14 potential items to submit to the jury.

15 I think that there -- the question here in my mind
16 is, is that one allegedly defamatory statement or is it
17 two? In other words, is it an allegedly defamatory
18 statement that Ms. Teter is a homeless, mentally ill
19 person who was paid as a political activist to provoke
20 violence? Or is that two separate statements to be
21 submitted separately, or analyzed separately, as to
22 whether they are defamatory? Do you disagree with that?

23 MS. WELLS: No, Your Honor. To answer your
24 question, we would take the position that that is two
25 separate statements.

1 THE COURT: Okay. But with regard to what you
2 were saying before of the question is whether or not the
3 jury should be submitted the question of, is video one
4 defamatory? I'm not seeing that. So are you leaving
5 that idea behind?

6 MS. WELLS: Yes, Your Honor, I will leave that
7 idea. I do think it's important that the jury be given
8 the entire context, even under a per se, because those
9 statements are being pulled out of that video just as the
10 *Renwick* case establishes.

11 THE COURT: Well and from an evidentiary point of
12 view you get to present your case in context. So I
13 didn't -- I didn't hear Mr. Dean arguing anything
14 different about that a moment ago, so I think that's
15 clear.

16 Mr. Dean, am I understanding correctly you're not
17 objecting to the presentation of the video; but you're
18 just objecting to the idea of the video as a whole being
19 presented to the potentially defamatory statement?

20 MR. DEAN: Exactly right, Your Honor.

21 THE COURT: Okay. One of the other things that
22 you did in what you presented was it presented separate
23 liability questions for each of the defendants. Now you-
24 all know this case a whole lot better than I do -- that's
25 the understatement of the week -- but I have always been

1 looking at this from the standpoint that the plaintiff's
2 case rises and falls as to all three defendants equally.
3 This indicates to me that maybe that's a misapprehension
4 on my part. So either Ms. Wells or Mr. Dean either one
5 of you.

6 Do we need to split it up as to the three
7 defendants with separate questions?

8 MR. DEAN: Your Honor, from the defendant's
9 perspective, we have not argued these issues before. We
10 have always preserved them in our documents but there is
11 no dispute that only one of the defendants published
12 video one and video two. That's Project Veritas Action
13 Fund. So we do believe that is an element that we want
14 to preserve to ask the jury about for trial, you know, if
15 it should even get that far. These are Project Veritas
16 Action videos.

17 James O'Keefe is an officer of Project Veritas
18 Action. Project Veritas is a separate entity who employs
19 the investigators. But this isn't a case about
20 negligence and, you know, of an employee. This is a case
21 about defamation. And one of the elements is that the
22 defendant published the statement. In this case, you
23 know, video one and video two, undoubtedly, were -- I
24 think we stipulated were published by Project Veritas
25 Action. So we think that is an issue that requires

1 separation, although we don't believe that all three
2 issues or the issues as to each defendant should reach
3 the jury for that reason.

4 THE COURT: Okay. MS. Wells or Mr. Sasser, who
5 wants to respond to that?

6 MR. SASSER: Your Honor, while Mr. O'Keefe is
7 indeed an officer of Project Veritas Action Fund, they're
8 all -- he and the other witnesses were all employees of
9 Project Veritas. So I wouldn't think that their actions
10 should be attributable to Project Veritas.

11 THE COURT: Well if I understood Mr. Dean's
12 argument just now he's saying, in essence, the question
13 as to Mr. O'Keefe and as to Project Veritas is likely not
14 to survive the Rule 50 motion because they are not
15 publishers. That was the thrust of his argument. And
16 I'm not seeing how what you just said is responsive to
17 that argument.

18 MR. SASSER: Mr. O'Keefe is the person in the
19 video making the statements, and he's the person
20 responsible and in charge of the company. I think that
21 when publishing the statement he's the one saying the
22 statement that goes out to the public. I think that's
23 publishing it. You can publish it without being the
24 publisher.

25 THE COURT: I'm trying to -- I haven't looked at

1 the videos since the summary judgment, and I'm trying to
2 recall the videos, but I thought that the alleged
3 defamation was the manner in which statements made
4 primarily by Mr. Foval were edited such as to cast a
5 certain light upon the plaintiff.

6 MR. SASSER: Yes, sir.

7 THE COURT: Now you're saying, no, it's
8 Mr. O'Keefe who is making the statements. And I'm not
9 remembering what is in those videos that would be -- that
10 would support the statement you just made. So remind me
11 of what I'm forgetting.

12 MR. SASSER: Well what he says specifically about
13 Mr. O'Keefe is --

14 THE COURT: Ms. Teter.

15 MR. SASSER: I'm sorry. He's saying I remember
16 this lady, her name is Shirley Teter and she claims she
17 was assaulted at a Trump rally; the media played it for
18 days. That's probably all he says directly about her.
19 There are other places where he refers to agitators who
20 are trained to come in and do these sorts of things. So
21 I think that holds him and, by respondeat superior, also
22 holds Project Veritas as well. He also says at the
23 beginning of the video that what you're going to hear
24 will disturb you; there may be criminal ramifications,
25 according to our lawyer.

1 THE COURT: Well it seems like that -- that's
2 going to be very fact specific. In other words, you're
3 going to have to present evidence at trial which, of
4 course, would be in the form of the video that I could
5 look at ahead of time as to whether there is anything
6 that Mr. O'Keefe individually does that constitutes the
7 making of a defamatory assertion and thereby constitutes
8 an element of the publication of that assertion.

9 MR. SASSER: We will have evidence that he takes
10 credit for it, Your Honor, and that he has in his book --

11 THE COURT: Is that even relevant? Is that not
12 something that is to be determined from the face of the
13 video itself? Either he did it or he didn't. You have
14 video evidence that answers that question definitively;
15 right?

16 MR. SASSER: Yes, sir, we will present that.

17 THE COURT: Okay. Well you say you will present
18 that. It's just in that video that's the subject of the
19 lawsuit; right?

20 MR. SASSER: Yes, sir.

21 THE COURT: Okay. I just want to understand your
22 argument. I don't want to go off on a tangent. It seems
23 to me -- this is related to the verdict form issue but
24 not something that actually shows up on the verdict form.
25 This whole issue of the plaintiff being a limited purpose

1 public figure because, it seems to me, even though that
2 is a fact based determination, the case law is pretty
3 clear that that is to be -- that determination is to be
4 made as a matter of law by the court. In fact, I think
5 the Fourth Circuit says that, quite specifically, in
6 *Foretich*. Does anybody disagree with that?

7 MS. WELLS: No, Your Honor.

8 THE COURT: Mr. Dean.

9 MR. DEAN: No, Your Honor. Your Honor, I believe
10 the record was essentially fully developed on that point
11 at summary judgment.

12 THE COURT: Well you say it's fully developed on
13 that. But I have to make that determination based on
14 what evidence is presented at trial, don't I? Is it
15 entirely independent on what is presented then? If there
16 is some elements of limited purpose public figure that
17 were presented for summary judgment that aren't
18 presented, now I have to make the determination based on
19 that new universe of evidence, don't I?

20 MR. SASSER: Your Honor, I'm afraid I -- I agree
21 with Mr. Dean on that. I think Your Honor may well be
22 able to decide that on the forecast of evidence, since
23 it's a legal issue.

24 THE COURT: Well how can I do it based on a
25 forecast of evidence where it is then determinative of

1 the case? In other words, in summary judgment I'm going
2 on a forecast of evidence saying, well, in the light most
3 favorable to the plaintiff, this is a possible outcome
4 and therefore I don't make a factual determination. I
5 don't make a determination on the facts, I make a
6 determination on what the evidence could tend to show.
7 It may or may not show that at trial. In fact, I've seen
8 that a lot of times where I deny summary judgment, we get
9 to trial and the plaintiff's case just comes unraveled.

10 It strikes me that this is something that's
11 totally different here. That especially looking at what
12 the Fourth Circuit says in *Foretich* that it is -- they
13 made a determination at the appellate level based not on
14 forecasts of evidence but based on the evidence that was
15 actually in the record before them. You know, the hard
16 and fast -- this is what the court has and, therefore,
17 the court makes a determination. Especially since you
18 and Mr. Dean agree on this I feel like maybe there's
19 something here I'm missing. Convince me why I'm wrong.

20 MR. DEAN: I'll take the first stab at it, Your
21 Honor, if that's all right with Mr. Sasser. I think
22 here one major point is that, regardless of the specific
23 posture, this case is a defamation case. We agree that
24 the facts are undisputed. So the facts that the parties
25 are relying on to -- for the Court's determination on the

1 public figure issue aren't disputed. Whether Ms. Teter
2 made certain statements to the media and how those
3 statements were broadcast, that's not in dispute between
4 the parties.

5 THE COURT: Let me stop you for a second because
6 there's another element of this that would seem relevant
7 to this, and that is whether or not Ms. Teter in fact --
8 the term I keep using is "lit the fuse;" started the
9 entire process. That's one of the reasons why I left
10 this case consolidated with the Campbell case until it
11 went away. Because it seemed to me that that
12 determination of what happened in that altercation may
13 not be dispositive but it certainly is a factor in
14 whether or not quote, unquote, Ms. Teter lit the fuse.
15 And that's a factor in whether or not she injected
16 herself into the situation so as to have volunteered that
17 second *Foretich* element. Am I misunderstanding
18 something?

19 MR. DEAN: Well I think, Your Honor, that from
20 the defendant's perspective, whether Ms. Teter inserted
21 herself into the debate, when you look at the case law
22 it's generally done in terms of what statements a party
23 has made or what they have said publicly on public
24 controversy. So there are two types of limited purpose
25 public figure. There's a limited public figure; there's

1 an involuntary public figure. I think Ms. Teter's
2 conduct in terms of the altercation is probably
3 involuntary public figure analysis. But on public figure
4 analysis says the way she behaved afterwards, we believe,
5 was sufficient in terms of calling the news back and
6 asking them to print the question about someone punching
7 -- a Trump supporter punching an old lady is deplorable;
8 participating with the media, and advocates from advocacy
9 groups -- activist groups. We think all that was
10 sufficient. I would say Your Honor --

11 THE COURT: Well regardless of whether you think
12 it's sufficient -- I mean, I realize that's your argument
13 --

14 MR. DEAN: Right.

15 THE COURT: -- but I need to make a determination
16 based on all of the facts that are pertinent to the
17 question. I'm just wondering, how can I do that without
18 having heard what that evidence actually is about the
19 altercation?

20 MR. DEAN: Right. And, Your Honor, if Your Honor
21 feels like that is something that's essential to the case
22 -- I agree that's not fully developed in summary
23 judgment, and that's something that would have to be
24 presented at trial.

25 THE COURT: Well then let me ask the next

1 question. Is that among the evidence that is going to be
2 presented at trial? Obviously if you-all aren't going to
3 be presenting evidence on that, maybe I do have the full
4 universe of evidence to decide this case. I'm certainly
5 not telling anybody how they need to try their lawsuit.

6 MR. DEAN: So, Your Honor, this actually gets at
7 what was a motion in limine for us. The defendant's
8 position is that Ms. Teter's testimony about what
9 happened at the altercation and in her claims after that
10 are relevant because those obviously were in the public
11 eye, what brought her to the public eye, and were the
12 direct subject of our second video.

13 Our position is that whether or not Mr. Campbell
14 in fact punched Ms. Teter in the face, swung
15 reflexively, or didn't touch her at all, isn't relevant
16 to this case because neither one of the videos either
17 affirms or denies that that punch happened.

18 In the first video Mr. O'Keefe states Ms. Teter
19 claims she was assaulted. And in the second video it
20 shows Ms. Teter's claim that Mr. Campbell cold-cocked
21 her, and then her later claim he might have hit her with
22 a back hand. Our position is, with a 401 issue, that
23 evidence is not relevant because it doesn't control
24 either defamation issue.

25 We've also argued, Your Honor, that it's

1 prejudicial under Rule 403 because Ms. Teter had an
2 opportunity to litigate the truth with Mr. Campbell and
3 elected not to do that. That case settled. This is not
4 a case about assault. I think there's a real possibility
5 that bringing in third parties in to testify about the
6 assault is simply going to encourage a jury to rule on a
7 motion -- to rule on passion but, maybe, more
8 importantly, to rule based on whether or not they think
9 she was punched, and that's not the issue.

10 Whether she was or wasn't punched doesn't control
11 whether our videos were defamatory. So our position is
12 that that evidence should not be admitted at trial
13 whether or not the parties have it available.

14 THE COURT: Well we've strayed pretty far afield
15 of where I started with this particular discussion.

16 Mr. Sasser, let me turn back to you. Is that
17 evidence that you're planning to present at trial that
18 you feel is relevant to the issues here.

19 MR. SASSER: Very briefly, Your Honor. I was
20 hoping to address the issue you're asking him about which
21 is the evidence of public figure or not a public figure.
22 And I think -- I think I agree with him that those are
23 things that really cannot be in dispute. What's in the
24 newspaper on September 14th or September 15th is kind of
25 undisputed. Those facts are there, and they're in front

1 of the court, and Your Honor can make that decision
2 without the trial. I think that would shorten their
3 case, because I think a lot of their case is about
4 whether she's a public figure or not. And then I'll be
5 glad to address the issue of, you know, whether she got
6 assaulted.

7 But I think if he and I are in agreement that the
8 facts as to whether she's a public figure are undisputed,
9 because there's a number of times she was interviewed and
10 that sort of thing, I think that issue is --

11 THE COURT: I don't suspect you-all are in
12 agreement as to whether she's a public figure or not. I
13 get the feeling you-all are in strong disagreement about
14 the issue.

15 MR. SASSER: Yes, sir. That's the issue we
16 raised and briefed and argued on summary judgment. But
17 the facts -- we think the facts are established because
18 they can't be disputed, and Your Honor can decide that.
19 But --

20 THE COURT: Let me go back to my other question
21 which is where I started with you a moment ago. Are you
22 planning to present evidence of the actual altercation
23 between Mr. Campbell and Ms. Teter?

24 MR. SASSER: Yes, Your Honor.

25 THE COURT: Well, if you are, then what is the

1 relevance of that if it is not relevant to the question
2 of whether or not she, in essence, became a volunteer?
3 In other words, she stepped into the situation rather
4 than the situation coming at her.

5 MR. SASSER: Because the jury is going to want to
6 know. How did this video come into existence? We've got
7 to tell them that she was at a rally and something
8 happened at the rally. Maybe there's a dispute about
9 what happened at the rally. That's not a major portion
10 of our case, but we think it's important just to add
11 context and let the jury know this is what happened. And
12 then a month later this video comes out.

13 If we start out just talking about their video
14 they're going to wonder well is did she get assaulted or
15 not? They don't need to decide -- I agree with him they
16 don't need to decide whether she got assaulted, but I
17 think it's going to be the kind of thing -- it's going to
18 be the elephant in the room.

19 THE COURT: Well Mr. Dean.

20 MR. DEAN: Just quickly, Your Honor. I'd say
21 that many of the facts surrounding the altercation are
22 already in the record as well including, you know, from
23 summary judgment. So we have Ms. Teter's testimony that
24 she engaged Mr. Campbell, you know, with her statements
25 about learning to speak Russian; we have her admission

1 that she followed Mr. Campbell; and then there's
2 disputes about what happened next. But what's in the
3 press coverage of that is essentially what the parties, I
4 think, would present at trial.

5 So I think that there is a significant volume of
6 evidence not just in the press but in the testimony that
7 was presented at summary judgment and in the answer to
8 request for admission that shed light on that that
9 essentially would just be repeated at trial.

10 THE COURT: Well it's going to be repeated at
11 trial anyway, isn't it? Because if I make a
12 determination based on what you filed for summary
13 judgment, and then based on that determination you do not
14 present a sufficient evidentiary basis to or foundation
15 to support that finding, when it goes up to the Fourth
16 Circuit, which I expect it will regardless of who wins,
17 they're going to make a new determination not based on
18 what you submitted at summary judgment but what was
19 presented at trial. So, I mean, all you're doing is
20 hanging me out to dry; right?

21 MR. DEAN: Not intentionally.

22 MR. SASSER: I was going to say the same thing
23 you were. I understand the judge -- Your Honor's
24 question. Maybe a summary judgment decision, or a ruling
25 on that, would include the undisputed evidence that the

1 parties presented at summary judgment. I don't know. If
2 you want me to go back to the issue of their motion in
3 limine and the assault I will address a couple of those
4 issues.

5 One is that video two says she changed her mind
6 about whether she was assaulted or not. So I think there
7 is an issue about the circumstances of the assault. So
8 that is relevant to the truth of video two. Also, video
9 one talks about her being out there and acting like a
10 bird-dogger. So what she was doing and how she was
11 acting, I think, is also relevant to the truth of video
12 one, Your Honor.

13 THE COURT: I didn't follow that last part because
14 the whole "bird-dogger" part I do not understand as being
15 something that you have alleged in your complaint as
16 constituting a defamatory assertion regarding Ms. Teter.
17 So why is that even relevant?

18 MR. SASSER: I did make that concession at
19 summary judgment, Your Honor, because it's a confusion
20 about a bird-dogger and a trained agitator, and I think
21 they are lumping all those in together in their video.
22 Where, normally, if you're talking about a bird-dogger
23 who stands up and asks questions and is kind of like a
24 pain to a candidate, that's one thing. But what they're
25 actually describing in the video was someone who's out

1 there inciting violence. And there may be some confusion
2 about "bird-dogger" meaning more than what Mr. Foval
3 described it. Because the whole context of the video --
4 they're describing what both Mr. O'Keefe and Mr. Foval
5 called agitators who are trained to provoke violence.

6 THE COURT: In light of the way you have cabined
7 your allegations in the complaint, why is that relevant
8 other than to present the full context of the statements
9 that do form the basis of your allegations in the
10 complaint?

11 MR. SASSER: I think it's relevant to show that
12 she was -- whether she was inciting violence or not,
13 which is, I think, one of the things Your Honor really
14 focused on as being potentially defamatory.

15 THE COURT: Okay. Well I -- particularly, in
16 light of the fact that you-all take the view that you do,
17 I'll take another look at that. But I'm not making any
18 promises that I'm going to make a determination about
19 limited purpose public figure before the close of all the
20 evidence. Obviously, that determination needs to be made
21 before the case gets submitted to the jury because it
22 dictates how the jury will be instructed. But I just --
23 I do not see the procedural mechanism by which there is a
24 record that is preserved to support my finding unless it
25 is the record from the trial. That's where I am right

1 now, but I'll give that some more thought.

2 MR. SASSER: I may be getting way out of my skis
3 here, Your Honor, but the stipulations may shed some
4 light on that. I'm not sure we've stipulated far enough
5 to give Your Honor some of what would be necessary to
6 make that decision but I'm just thinking out loud.

7 THE COURT: Well and I -- I actually read through
8 the stipulations again this morning, particularly with an
9 eye toward that issue. Obviously, I did it in something
10 of a hurry. But my shoot from the hip reaction was there
11 wasn't enough there. And maybe you-all can have further
12 stipulations to where we can do that before the trial
13 starts. But I'm sure you have bigger fish to fry between
14 now and the 20th.

15 Is there anything else that you-all want to
16 discuss about the verdict form, the issues to be
17 submitted to the jury, and to the extent that it affects
18 how, ultimately, the jury would be instructed? Any of
19 those issues that you want to talk about? Mr. Dean.

20 MR. DEAN: Your Honor, the issue of libel per se
21 versus libel per quod that both sides have highlighted.
22 In that event the only relevant evidence as to libel per
23 se is video one and video two. So I think both parties
24 -- they'll correct me if I speak out of school -- would
25 be -- you know, in this instance it seems like a ruling

1 whether it's based on -- couched as under the summary
2 judgment or as another type of pretrial ruling on those
3 points could impact the way that the evidence is
4 presented to the jury. But it could certainly impact how
5 the parties speak about the case in their arguments and
6 how the parties speak about the case between now and the
7 beginning of trial. So that's the only other issue that
8 we would raise as having a potential impact. And it is
9 one where the evidence at trial simply won't be relevant,
10 because the mandate from the North Carolina Supreme Court
11 is that only the publications can be considered.

12 THE COURT: Well, Mr. Sasser, do you want to
13 respond to that?

14 MR. SASSER: Your Honor, as much as I hate to aid
15 and abet Mr. Dean and asking the court to do more work,
16 I kind of agree that Your Honor can look at video one and
17 video two and determine from the entirety, the four
18 corners of those documents, whether it's per se or per
19 quod.

20 THE COURT: And then are you in agreement with
21 Mr. Dean that that is going to make a substantial
22 difference as to how the case is presented to the court
23 and to the jury?

24 MR. SASSER: I may not be in agreement on that,
25 Your Honor. I think that we may be presenting in a lot

1 of the same material regardless of that decision.

2 THE COURT: Well it seems to me that what
3 Mr. Dean is saying is a lot of that would be
4 inadmissible. And if -- based on -- say, for instance, I
5 make a ruling that if it's anything it's libel per se.
6 If I'm understanding Mr. Dean correctly he's saying,
7 well, then under existing case law the only thing that
8 the jury can consider is the document itself, the videos.
9 Do you disagree with that?

10 MR. SASSER: Yes, sir, I do disagree with that
11 with regard to a number of issues.

12 THE COURT: Like what?

13 MR. SASSER: Such as damages. Such as --

14 THE COURT: Well let me recast my question because
15 I don't think Mr. Dean is saying you didn't present any
16 other evidence as to any other aspect of the lawsuit.
17 You still have to prove the falsity. So you have to
18 present some sort of context that shows that the implied
19 statement was in fact not true. You still -- if you're
20 seeking damages you have to present your evidence of
21 damages. He's not saying that -- at least I don't
22 understand Mr. Dean to be saying that you are limited to
23 presenting evidence as to that one element to the
24 exclusion of the other elements of your case. But as to
25 the element of defamation he's saying that's it; that's

1 all you get to present.

2 MR. SASSER: If Your Honor was to decide that it
3 was defamatory per se.

4 THE COURT: That's what I'm talking about. I'm
5 not -- I haven't made that ruling. I'm just saying
6 hypothetically if I make the ruling that it is, if
7 anything, libel per se, how -- does that not limit, or
8 does that limit your evidentiary presentation that you
9 said no? Why not?

10 MR. SASSER: I think whether or not it's an
11 element of the tort is still relevant that certain people
12 saw this and realized it was defamatory. Even though I
13 don't need to prove that it goes to what happened here.
14 It may not be part of the defamation per se whether it's
15 defamation but it sure goes to the overall presentation
16 of our case.

17 THE COURT: Well maybe I could cut to the chase by
18 asking Mr. Dean, more particularly, what is the evidence
19 that you understand that the plaintiff has in her quiver
20 that would not be admissible if I make a determination
21 that the videos, if anything, constitute libel per se?

22 MR. DEAN: I think it affects two key pieces of
23 information that are highly in dispute whether admissible
24 under any circumstances. One of that would be these
25 YouTube comments. If it is defamation per se the

1 plaintiff doesn't have to prove that a third party heard
2 and interpreted the statement as defamatory because the
3 Court has already made that determination as a matter of
4 law. And then secondarily if it's defamation per se the
5 plaintiff -- you know, depending on their constitutional
6 analysis of actual malice, the plaintiff is entitled to
7 presume damages and doesn't have to prove pecuniary
8 damages as she would have to for a defamation per quod.

9 Again, in this case, there is -- there's a dispute
10 about whether even if plaintiff proceeds on the per quod
11 theory she can put into evidence what she wants to on
12 special damages. But I think if it's defamation per se
13 she doesn't have a need to. So, in fact, while she could
14 put in evidence --

15 THE COURT: Let me stop you for a second because
16 my question is, what is it that you understand would be
17 part of the plaintiff's case that then would not be --
18 not come in? It would not be admissible because of a
19 determination that it is, if anything, per se.

20 MR. DEAN: I think it dramatically impacts the
21 admissibility on relevance grounds of the YouTube
22 comments and any third party testimony. There's some in
23 the depositions whether where they've attempted to use
24 third parties where they said they viewed our testimony.
25 Any of that testimony is inadmissible and --

1 THE COURT: Let's say for the fact that somebody
2 else viewed the video that's relevant to publication
3 that's an element that the plaintiff has to prove. Why
4 wouldn't it come in then?

5 MR. DEAN: It may be cumulative. I think it
6 would be cumulative of publication. And, again, when
7 it's issues like the YouTube comments, you know, the risk
8 of prejudice by those comments is so significant that the
9 cumulative effect of showing that someone else saw the
10 video.

11 THE COURT: Again, I'm sorry to keep interrupting
12 you --

13 MR. DEAN: That's all right.

14 THE COURT: -- to try to get to the point.
15 Cumulateness is cumulativeness regardless of the reason
16 why it's admissible. Say, for instance, with the YouTube
17 comments. If the plaintiff is offering the YouTube
18 comments to show them as having spurred her anxiety,
19 therefore it's relevant to damages something of that
20 nature. Then, yeah, after two or three of them it
21 becomes very cumulative.

22 And if -- if they keep going with that you'll
23 object; I may sustain it. If they keep going with it you
24 might object and I might overrule it, but then the jury
25 penalizes them for just belaboring the point. That

1 doesn't get to the question of whether or not those
2 comments would come in. And it seems like, at least on
3 that scenario -- I'm not previewing any rulings here.
4 But on that scenario at least some of them would come in,
5 wouldn't they?

6 MR. DEAN: I don't think so. Because it's a
7 weighing analysis under Rule 403 of marginal probative
8 value versus risk of cumulative waste of time. And if
9 we're talking about defamation per se, the probative
10 value is, I think, nonexistent but, in any event, is far
11 less than the probative value that it's defamation per
12 quod depending what they're using the piece of evidence
13 for. And I would say the other piece of evidence I
14 didn't use earlier is this whole side about her medical
15 expenses and neurofeedback therapy. Certainly she could
16 present that if she wanted to on a per se claim, but she
17 would not be required to.

18 THE COURT: As to this question: Then why does
19 that make any difference? If she can present it either
20 way she's going to make -- Mr. Sasser and his cohorts
21 here are going to make a determination as to whether it's
22 a beneficial part of their case. It's not a question of
23 whether or not it's admissible.

24 MR. DEAN: That's right, Your Honor. I agree
25 with you, Your Honor. I think the biggest reason is for

1 the party's clarity. Frankly, the biggest reason for a
2 ruling on this issue is for the party's clarity and the
3 way they think about this case in the way they prepare
4 for the case in terms of what themes and what evidence
5 and those types of things. It may not, at the end of the
6 day, make a huge difference in the presentation of the
7 evidence. A ruling on defamation per se would take
8 elements off the table that Ms. Teter is otherwise
9 required to prove.

10 THE COURT: Mr. Sasser, do you have anything else
11 you want to say on this point?

12 MR. SASSER: Your Honor, your questions for
13 Mr. Dean make it very clear that I cannot possibly add
14 anything that would be of any more assistance to the
15 Court. Your Honor understands the issues quite well. If
16 we're going to put in her medical records, yes, we can do
17 it under both of those. It might be more relevant under
18 one than it is under the others. But I think Your Honor
19 understandings this issue.

20 THE COURT: You guys are getting so agreeable with
21 each other it seems like you ought to be able to settle
22 the case. I wasn't expecting this level of agreeability
23 between the -- I will take a look at that issue. I think
24 under the law this is very different from what we were
25 talking about a minute ago because I think the

1 determination of per se versus per quod is something to
2 be made quote, unquote from the four corners of a
3 document. I hesitate because it's hard for me to think
4 about a video as a document, but within defamation law it
5 is. But it's something to be determined from the four
6 corners of the document, and the document is something
7 that is before the court. It's the same document that's
8 going to be going to the Fourth Circuit when whichever
9 one of you is on the short end of this case takes it to
10 the Fourth Circuit. So I can make that determination
11 before trial.

12 And I will take a close look at that, but I'll
13 tell you where I am right now. It seems to me that these
14 videos are, if anything, libel per se. I have trouble
15 seeing how this fits into a libel per quod box. I
16 haven't read all the cases yet so I reserve ruling on
17 that. I'll let you know in some form as to what my
18 determination is, but that's where I am at this point,
19 and I will say, particularly in light of the manner in
20 which this was pleaded. In other words, the pleadings in
21 this case point to the videos in particular and how these
22 two issues are presented to the public in these two
23 videos is either libelous on its face or it's not. So
24 that's where I am on that point right now.

25 Are there any other issues regarding the verdict

1 form, the manner in which the jury would be instructed --
2 not specific instructions. I'll work on those between
3 now and the trial. But all of these sort of broader
4 legal issues that we're dealing with before we get into
5 things like motions in limine, the depositions.

6 Hearing none, let's move on from there. The first
7 thing that I want to address, so that I don't forget it,
8 is there was this individual named Leslie Boyd, who is
9 apparently under subpoena, who sent a letter to the court
10 which then we filed, because the Court would treat that
11 as a Motion to Quash the subpoena. There was some
12 indication that you-all have resolved the issue of how to
13 handle that. So is that resolved?

14 MR. DEAN: Very close, Your Honor. We agreed
15 amongst the parties to four stipulations, I think, that
16 cover the bulk of Ms. Boyd's testimony. There were about
17 maybe 20 or so lines of deposition testimony that the
18 defendants would offer that the plaintiffs don't
19 stipulate to and that they would like an opportunity to
20 be able to counter designate. And if the Court is
21 agreeable to allowing us to designate those lines of
22 testimony which are included in the motion that we've
23 already filed with the Court they're already in the
24 record. And for the plaintiff to be able to counter
25 designate those then we are happy to present Ms. Boyd by

1 the stipulations and by the limited deposition testimony.

2 THE COURT: So am I understanding correctly that
3 even though Ms. Boyd may not be technically "unavailable"
4 within the meaning of Rule 32 you're willing to stipulate
5 that she is unavailable so that her deposition may be
6 used.

7 MR. DEAN: Yes, Your Honor, and we filed a motion
8 to that effect.

9 THE COURT: Okay. Mr. Sasser, I see you nodding.
10 Do you agree with that?

11 MR. SASSER: Your Honor, we would like the
12 opportunity to counter designate if that motion is
13 granted. There's another issue that is relevant based on
14 our other discussions. She is a witness solely on the
15 issue of public figure. And if that issue is resolved
16 before trial she wouldn't be necessary at all, along with
17 several other witnesses.

18 THE COURT: Well, regardless of whether you
19 stipulate that she's unavailable and make counter
20 designations, it doesn't mean that the defendant has to
21 offer that deposition.

22 MR. SASSER: Yes, sir.

23 THE COURT: So, I mean, that's a determination
24 that can be made then. And if it is something -- again,
25 my frame of mind still is if that's evidence that is

1 relevant to the question of whether or not Ms. Teter is
2 a special purpose public figure, then if they want to
3 present that evidence, if it is in fact pertinent to it,
4 then I'll hear it.

5 MR. DEAN: Your Honor.

6 THE COURT: Yes Mr. Dean.

7 MR. DEAN: I apologize, Your Honor. I think if
8 we could -- if we could get some clarity on the
9 designations in terms of the timing. We designated, like
10 I said, I think 20 or so lines which we will treat as
11 direct testimony. So I assume there's not going to be a
12 huge volume of counter designations. But could we set a
13 deadline for when the counter designations are due so
14 that if there are any objections to the counter
15 designations we can make sure those are presented to you
16 in time to have a deposition ready to go? This is one
17 that would not be presented by video, so there's no clips
18 to be cut. It's just a matter of knowing what we're
19 going to be reading.

20 THE COURT: Well, Mr. Sasser, how long do you need
21 to figure out your counter designations?

22 MR. SASSER: Tuesday should be fine, Your Honor.

23 THE COURT: Can you do it more quickly than that?
24 I was -- I figured you'd tell me, you know, 9 o'clock
25 Monday morning. How short is this deposition?

1 MR. SASSER: I'm not sure.

2 THE COURT: I mean, Mr. Dean said his part -- I
3 thought he said is 20 lines.

4 MR. SASSER: Maybe an hour long. If Monday
5 morning is the time Your Honor would like then we could
6 do that.

7 THE COURT: How about I give you until 5 o'clock
8 on Monday? That gives you all day on Monday to get it
9 done. It doesn't sound like you're going to need that
10 much time.

11 MR. SASSER: Thank you, Your Honor. We will do
12 that.

13 THE COURT: To this point, though, do I understand
14 correctly that there aren't any objections regarding the
15 Leslie Boyd deposition? Is that right?

16 MR. SASSER: I'm not sure, Your Honor. I would
17 like the same time to do the objections and counter
18 designations.

19 THE COURT: Okay. That's one of the reasons I
20 raised it. Objections and counter designations by Monday
21 at 5:00.

22 Mr. Dean, Mr. Montecalvo, objections to counter
23 designations by Tuesday at 5:00?.

24 The next thing that I wanted to address were the
25 deposition designations because, I have to admit, I have

1 never been so overwhelmed with deposition testimony for a
2 trial. But then again I have never had a trial actually
3 go to a jury in which the parties were proposing to
4 present seven witnesses by way of video deposition.

5 Just as an aside, the jury is going to hate you
6 just so that you know. That is very counter to their
7 expectations of how a trial is done. Be that as it may,
8 you try the case however you want to do it. It puts an
9 awfully big burden on the Court to go through all these
10 because you-all filed those deposition designations -- I
11 think we finally got them in the ECF system yesterday,
12 and there was like 1,700 pages.

13 How much time do you need to edit the videos?
14 Because this is going to take time. If I had any idea
15 that you-all were doing this -- and this isn't your
16 fault. It's my fault. If I had any idea you were doing
17 this I would have given you a deadline of three weeks
18 ago.

19 MR. SASSER: Your Honor, we have already started
20 trying to cut back on that. I have sent the other side a
21 shorter version of James O'Keefe, and I plan to do that
22 with the other witnesses as well and try to cut them to
23 the bone. Basically, these were, I think, at least from
24 our side and maybe from the other's, we just wanted to
25 make sure that everything we felt was relevant would be

1 in there in case we needed it.

2 Now, looking at it from the perspective of cutting
3 the video that somebody's going to have to look at for an
4 hour or so, we're being a lot more careful. There's
5 going to be some duplication on those on a couple of
6 videos but I'm going to cut that out. So that was my
7 goal was to get that done by the end of this week. But I
8 plan to keep slugging away at that with the cooperation
9 of the other side.

10 THE COURT: Well, in light of that, what is it
11 that you want me to do? Do you want me to wait?

12 MR. SASSER: I think it would be a good idea for
13 Your Honor to give us a little more time to try to narrow
14 the universe of what Your Honor needs to consider,
15 because we would hate for you to have to consider
16 something that we've decided voluntarily to omit. If I'm
17 speaking for both sides --

18 THE COURT: Mr. Dean, Mr. Montecalvo, what say
19 the two of you as to the timetable for getting me what I
20 really need to be looking at on this.

21 MR. DEAN: I'd say it needs to be a pretty swift
22 turn around, Your Honor, only because, unfortunately, I
23 think there will be a good bit remaining for the Court.
24 You know, obviously, if you're at trial and a line of
25 questioning were begun and an objection were sustained,

1 it would end. But in a deposition the questioning goes
2 on because it's a deposition and that's the format. So
3 while I think there's probably only eight or ten
4 different types of issues the Court's going to see,
5 there's just many instances of those.

6 So I really think if we are trying to revise
7 what's been designated I don't want there to be a false
8 impression that that's going to leave the Court with very
9 little. Unfortunately, I think there will still be a
10 little bit. I don't think it would give the Court
11 sufficient time, given what you said about the week prior
12 to trial, if we don't get those to you still fairly early
13 next week.

14 THE COURT: By what date do you need the answers
15 in order to edit these videos?

16 MR. SASSER: I'd say a few days before trial,
17 Your Honor. But I have another suggestion. If the Court
18 gives us some guidance on the motions in limine I think
19 that will -- at least if Your Honor says none of this
20 stuff is coming in I'll cut that out of my designations,
21 and I would assume that the other side would as well. Or
22 if Your Honor says that stuff is coming in under the
23 motion in limine, then I would expect their objections to
24 be withdrawn.

25 THE COURT: Okay. Well and we might make some

1 headway there. Often though with motions in limine it
2 it's dependent on what foundation is presented in order
3 to make the evidence admissible. So we might make some
4 headway; we might not. But we'll get to the motions in
5 limine here shortly. That's helpful.

6 I'll be candid with you. One of my reservations
7 about the timetable is the week of the 13th is the
8 court's district conference. So I'm completely bottled
9 up that week to where I will have very little opportunity
10 to do anything during that week. So, for instance, if I
11 don't get the questions from you until Monday, the 13th,
12 I don't know how I'm going to get you an answer before
13 the day you're picking the jury. So let's see how much
14 headway we make when we get to the motions in limine.

15 Just going through my list here. Is there
16 anything else that any of you want to address before we
17 move on to the motions in limine? Okay.

18 Let me get rearranged here so I can get everything
19 in front of me regarding the motions. Well the very
20 first motion in limine is the one that we've already
21 spent some time on, and that has to do with the evidence
22 of the altercation. To me, regardless of the issue of
23 limited purpose public person, public figure, that at
24 least has some 401 relevance as to whether the plaintiff
25 was one who provoked violence or had the intent to

1 provoke violence. So it seems that there is 401
2 relevance.

3 Now there was some hint that this evidence might
4 become cumulative under 403. But I -- I don't know
5 cumulative until I see it. I don't know that there's a
6 lot more that I can say about that. I think you-all know
7 what I'm talking about. Obviously, if you talk about
8 some topic from a couple of different angles it's not
9 really cumulative yet because you're giving that flavor
10 of different perspectives. However, there is a point
11 that you reach fairly quickly where the jury starts
12 rolling their eyes. And when the jury starts rolling
13 their eyes I start sustaining objections as to cumulative
14 under 403.

15 Does that give you enough guidance to understand
16 where I stand regarding evidence of the altercation?

17 MR. SASSER: Yes, Your Honor.

18 THE COURT: Mr. Dean.

19 MR. DEAN: Certainly, Your Honor. We would argue
20 that there are other factors as well. Misleading the
21 jury as to what they are to decide and creating prejudice
22 by drawing a connection as if there's some link between
23 the defendants in this case and Mr. Campbell. But we
24 understand your ruling, and we'll raise appropriate
25 objections at the time of trial. If I may. I understand

1 that the witnesses on this issue will be live witnesses.

2 MR. SASSER: That's correct.

3 MR. DEAN: We can raise those issues. We will e
4 raise any issues as appropriate when the witness is on
5 the stand.

6 THE COURT: Is Mr. Campbell going to be
7 testifying?

8 MR. SASSER: Not from us, Your Honor.

9 MR. DEAN: We have Mr. Campbell's deposition
10 designated and Mrs. Campbell's deposition designated, and
11 we have some rebuttal witnesses who will testify live as
12 well. Mr. Campbell lives in South Carolina, is older
13 and not in good health, and is unwilling and unable to
14 travel for trial.

15 THE COURT: I see.

16 Okay. The next motion in limine had to do with
17 special damages. Here a lot of the argument had to do
18 the necessity of special damages and if there is a claim
19 under per quod, et cetera. It seems to me that this
20 boils down to a fairly simple issue. And that is Rule
21 9(g) says special damages have to be specifically
22 pleaded, and I don't see where they were pleaded. Am I
23 missing something.

24 MS. RINI: I briefed this, Your Honor. I believe
25 you're correct. We would argue that Ms. Teter's

1 complaint says that she will incur out-of-pocket expenses
2 and other damages because she continues to live in fear
3 for her safety and that --

4 THE COURT: Yeah. How does that qualify under
5 9(g)? I mean that's -- that's not even in the ballpark,
6 is it?

7 MS. RINI: Well we would argue that even if there
8 is not -- even if it's an improbable factual allegation
9 at the time of the filing of the complaint, that during
10 discovery there might be items in evidence that come up
11 that could show an incurring of out-of-pocket expenses to
12 show that she lived in fear for her safety. And there's
13 also allegations in the complaint that she suffered
14 emotional distress and that defendant's videos have
15 caused mental distress of a very serious nature.

16 THE COURT: Well what I understood to be the focus
17 of this motion in limine was the evidence regarding the
18 neurofeedback therapy and any costs related to that. I'm
19 having trouble seeing how you have given notice of any --
20 well and 9(g) is -- it's not a notice pleading. It says
21 if any item of special damage is claimed it must be
22 specifically stated. Explain to me how you think that
23 the neurofeedback therapy evidence and bills fall within
24 that provision.

25 MS. RINI: It would be a broad reading of the

1 three portions of the complaint that we've cited to. The
2 three paragraphs of the complaint we've cited to -- and I
3 would remind Your Honor this is only to show defamation
4 per quod. It doesn't show anything with regard to
5 defamation per se because there is no special damages for
6 need to show defamation for per se.

7 THE COURT: If you're only going on a defamation
8 per se theory then you wouldn't be presenting any of
9 this.

10 MS. RINI: We would still be presenting it but we
11 would not have had to alleged special damages in our
12 complaint, because defamation per quod requires as an
13 element of defamation per quod that the plaintiff provide
14 -- that the plaintiff allege special damages in her
15 complaint.

16 THE COURT: That's not how I read Rule 9(g). Rule
17 9(g) says if an item of special damage is claimed. It
18 doesn't say if claimed pursuant to libel per quod.

19 MS. RINI: Right, Your Honor.

20 THE COURT: It says if it's claimed it must be
21 specifically stated. So even if you're going on a libel
22 per se theory, in order to recover those special damages
23 you have to have pleaded them. That's what 9(g) says,
24 isn't it?

25 MS. RINI: You're correct, Your Honor. In order

1 to show cumulative damages or, I think, presumed damages,
2 we would still introduce evidence of neurotherapy
3 expenses and records but it wouldn't be for special
4 damages. So there would still be evidence of --

5 THE COURT: How are you going to get that in for
6 -- treat them separately; presume damages or punitives?
7 I mean isn't that just a back door way of saying, ladies
8 and gentlemen of the jury, we really want you to put this
9 in the blank?

10 MS. RINI: It would tend to show that Ms. Teter
11 had some serious anxiety as a result of these videos, and
12 that she sought out special help for that.

13 THE COURT: Well, Mr. Dean, what do you have to
14 say?

15 MR. DEAN: Well a couple of responses. As to
16 just the portion of the 9(g), we do think they have other
17 problems on this evidence. I agree with Your Honor that
18 medical expenses are pecuniary damages and they should be
19 specifically stated. I don't think that you can end
20 around the pleading rule by offering them for some other
21 purpose like showing emotional distress. Allegations of
22 emotional distress, as a matter of law, aren't sufficient
23 to show special damages. There's lots of cases we cited
24 to that effect so I won't belabor that.

25 I would also just point out to a bigger issue with

1 this type of evidence, Your Honor, which is a causation
2 issue. I don't think Ms. Teter may testify that she has
3 anxiety that was caused by something specific that
4 necessitated medical treatment, particularly in light of
5 her past history of anxiety and the many other anxiety
6 inducing conditions and stressors in her life that she
7 reported to her therapist --

8 THE COURT: Let me stop you for a second because
9 that goes to the question of whether or not Ms. Teter
10 lays an adequate foundation for the admissibility of
11 something that would otherwise be admissible. Right now,
12 since this is in the form of a motion in limine, I want
13 to deal first with the issue of is it admissible? Even
14 if she lays the foundation that you're talking about, is
15 she going to be able to get it in?

16 MR. DEAN: Is it admissible? That's a little
17 different from our motion. We have not argued that the
18 medical expenses -- our bases for our motion in limine,
19 Your Honor, are the failure to plead and then the fact
20 that this evidence was not provided during discovery.
21 Some of it wasn't provided until after summary judgment.
22 So these are really Rule 9(g) and then Rule 26 and Rule
23 37 motions.

24 Your Honor, the notion that this evidence was ever
25 disclosed to us is belied by the plaintiff's counsel's

1 correspondence with us. When they produced documents to
2 us in late March, after the summary judgment argument,
3 they produced a set of Medicare records. We wrote back
4 and said, on the face of these records it looks like they
5 were downloaded in October. Why weren't they provided to
6 us? And in, you know, a candid response, counsel wrote
7 back and said that they didn't appreciate the relevance
8 of Dina Rose, who was the neurofeedback therapist at the
9 time that the records were downloaded; and they didn't
10 appreciate their relevance, they said, until the last
11 week of discovery.

12 So if, Your Honor, they didn't even appreciate
13 that these neurofeedback records were relevant until the
14 last week of discovery, it is impossible that the
15 complaint -- the initial disclosures or the interrogatory
16 answer that they provided could have disclosed these
17 medical expenses to us.

18 So, you know, I'd say that even apart from 9(g), a
19 bigger problem that we have with this medical expense
20 theory is the only thing we received within the discovery
21 period -- it was only three or four days before the
22 discovery period closed were copies of the treatment
23 records themselves received, but no copies of anything
24 relating to expenses, and nothing that tied us to that
25 treatment.

1 And I'd point out, as we did at summary judgment,
2 Your Honor, those records that we received they didn't
3 put us on notice that Ms. Teter was going to be seeking
4 medical expenses from these defendants, because the
5 medical records don't mention these defendants or
6 defendant's videos or YouTube comments. So our bigger
7 problem with this evidence is that the actual
8 documentation of expenses, Medicare records, those
9 weren't produced until late March of this year, and we
10 never had any notice of those records beforehand.

11 As to medical expenses generally. We asked
12 specifically from Ms. Teter, what are your out-of-pocket
13 expenses? That phrase she used in paragraph 61. We
14 asked an interrogatory. It was our first interrogatory
15 directly on that point. The only thing that she
16 disclosed was the costs of buying a new cell phone.

17 And if you go back further to her initial
18 disclosures she claims that she is seeking medical
19 expenses in a specific amount of, like, \$2,504. And the
20 documentation that she provided is an emergency room bill
21 from the time -- from the date when she had an
22 altercation with Mr. Campbell. Of course that was a
23 consolidated disclosure. So the only thing she gave
24 notice of was seeking medical expenses from her emergency
25 room visit from Mr. Campbell.

1 So our problem with the medical expenses is we
2 never had any notice of a medical expense theory from the
3 time the complaint was filed. The first time we ever
4 heard anything about neurofeedback -- and this treatment
5 was provided before she filed her complaint. The first
6 time we heard about it was when we got some records that
7 don't refer to us, and we received those four days before
8 discovery closed.

9 The first time we received any evidence that
10 showed even Medicare was billed for those services was on
11 March 26th, which was a week after summary judgment
12 argument. So we haven't been able to depose the
13 therapist who provided this treatment. We haven't been
14 able to -- we didn't have any of the expense information
15 at our disposal when discovery was conducted when
16 Ms. Teter was deposed, and it's a paradigm situation for
17 the application of Rule 37. They had the information as
18 early as October, and they didn't disclose it to us. It
19 is prejudicial to us to have to try to defend something
20 by gleaning what information we can outside of the
21 discovery period. So I think that is the main reason why
22 we believe this evidence should not be admitted.

23 THE COURT: Okay. Any response?

24 MS. RINI: I would say, Your Honor, that we
25 disclosed -- there's a distinction between the different

1 records that were disclosed. On one hand, there are the
2 neurotherapy records themselves which are the therapist's
3 notes for Ms. Teter from the year of, you know, about
4 February 2017 through the end of 2017, And then there are
5 Medicare expense records and those are the billing
6 statements from Medicare. And then --

7 THE COURT: But as to those two components. The
8 first one is what you produced two days before the
9 discovery period ended, and the second group was what you
10 produced months after the discovery period ended. Right?

11 MS. RINI: That's correct. And we produced the
12 neurotherapy records the day before Ms. Teter's
13 deposition. So the defendant did have an opportunity to
14 cross-examine her about it. Mr. Campbell's counsel did
15 cross-examine her about them for -- I mean there's at
16 least three pages in her deposition about the
17 neurotherapy records. And because they were, you know,
18 tied to seven hours total to depose Ms. Teter they sort
19 of divvied up the responsibilities.

20 THE COURT: Well but, still, even though it was
21 before the deposition, producing something in the nature
22 of damages, particularly anything related to healthcare
23 treatment two days before the discovery period ends, how
24 is an opposing party supposed to prepare anything, do any
25 followup discovery, other than simply asking the patient?

1 MS. RINI: Well they didn't ask her anything
2 about the neurotherapy records despite the fact that it's
3 axiomatic that if you go to therapy you're suffering from
4 some sort of anxiety related to something. And we've
5 alleged in our complaint and in all of our pleadings, or
6 in all of our documents during discovery to them, that
7 she suffered anxiety and feared going out into public as
8 a result of their videos. So that would be our argument.

9 THE COURT: Well, with regard to this, the fact
10 that the special damages were not pleaded, there was
11 nothing that even mentioned a connection between any of
12 the alleged defamation and any sort of neurofeedback
13 therapy or recovery related to neurofeedback therapy,
14 coupled with the fact that apparently plaintiff's counsel
15 didn't see any connection between the alleged defamation
16 and the neurofeedback therapy so that plaintiff's counsel
17 didn't see it as within the purview of anything that was
18 pleaded, added to the fact that a portion of this was
19 provided two days before the discovery period ended, and
20 the other portion was provided months after the discovery
21 period ended. I believe that just in the interest of
22 fairness, as well as to comply with Rule 9(g), the
23 evidence regarding the neurofeedback therapy, and
24 particularly regarding the bills regarding the
25 neurofeedback therapy, would not come in.

1 The next one has to do with the YouTube comments.
2 Here's the way I'm looking at the issue of the YouTube
3 comments. The plaintiff is saying that the defamation
4 had this -- the alleged defamation had this impact on her
5 life making her fearful, et cetera. And a portion of
6 that impact is by way of what she's seeing in some of
7 these comments. First of all, that's not a hearsay use.
8 It's showing the comment for the purpose of its effect
9 not for the purpose of its truth.

10 But I see some real pitfalls to this under 403, in
11 particular. Number one, because we've all looked at
12 comments on the Internet. It doesn't matter what the
13 article is, it seems like by the end of the day there are
14 1,400 comments; 1,300 of which are completely idiotic.
15 It can become cumulative very quickly. And when they're
16 cherry-picked they can become unduly prejudicial.

17 So my thought is so long as they are being offered
18 for the limited purpose of showing the impact on the
19 plaintiff that, to a very limited degree, they can come
20 in. I'm not going to allow them, for instance, for the
21 purpose of publication. Because in order to show that as
22 evidence of publication you are going to have to
23 authenticate from whom the comment came. You have to
24 show that it's from a real third person. Now if you have
25 that evidence maybe thick things are a little bit

1 different from what I understand here. But if it's
2 anything like ordinary comments on the Internet I doubt
3 you have such information. I've kind of told you what my
4 first blush reaction is. Do either of you want to say
5 anything to try to move me off of that point?

6 MR. DEAN: I would, Your Honor, which is,
7 candidly, I don't know how to resolve this issue at this
8 moment. But these comments, as you have noted, Your
9 Honor, have the potential to be extremely prejudicial
10 considering the language. I assume Your Honor has
11 perused the complaint and seen some of the language
12 that's used. My concern is that that prejudice can't be
13 fixed once a comment is read, and Ms. Teter has not told
14 us which of these comments she actually read.

15 So Your Honor is admitting them for the limited
16 purpose of showing she read comments and felt
17 trepidation. I think that that is the extent of the
18 information that should be admitted is that Ms. Teter
19 saw comments and they were -- she interpreted them as
20 threatening to her, and that made her feel fearful. Or
21 at the minimum, Your Honor, that before a specific
22 comment is read there must be some type of foundation
23 laid to prove that Ms. Teter read that comment.

24 I haven't seen anything in this case that says
25 here are the specific comments that Ms. Teter read. We

1 asked her about this in her deposition, and I don't
2 believe that she was able to testify about any comment
3 with precision. I know that -- I'm trying to peruse her
4 deposition outline at this second, and I can't do it fast
5 enough. I know she testified in general about what some
6 of the comments said, but she certainly did not use, you
7 know, the language that is used in these comments.

8 And she certainly did not say that someone called
9 themselves "Mein Fuhrer" and put a swastika on the
10 comment. So a significant concern for us is just that,
11 in terms of prejudice these comments that have been
12 presented in the complaint, they are not the comments --
13 I don't think they have ever been represented to be the
14 comments Ms. Teter actually read.

15 THE COURT: Let me stop you there for a second
16 because, obviously, for it to be -- for a comment to be
17 evidence of the impact upon the plaintiff she's going to
18 have to lay a foundation that she in fact read the
19 comment within the relevant time period. Otherwise, it
20 cannot have an impact. So I don't see what you're
21 arguing about as a potential problem. Because if she
22 can't -- if she can't identify it as what she read then
23 it doesn't come in at all.

24 MR. DEAN: Right, Your Honor. I guess I'm
25 questioning the procedure by how that happens. For

1 example, if a document is placed in front of her that
2 says, is this one of the comments you read? Then that's
3 one thing. But if it's -- if plaintiff's counsel has to
4 say the comment out loud and then say, did you read that?
5 Regardless of her answer, the jury's heard it.

6 THE COURT: Well I certainly hope that plaintiff's
7 counsel knows better than to try to present anything in
8 that manner. Obviously, I'm going on some assumptions
9 here. I assume that these comments are going to be in
10 the form of some sort of exhibit, and that exhibit can be
11 displayed to the witness, who presumably would be
12 Ms. Teter, without being displayed to the jury.

13 Counsel can ask Ms. Teter, do you see that third
14 comment there, or the third line, on Exhibit 65? You
15 know, yes, I do. Have you seen that before? Yes, I
16 have. Where did you see it? I say it on the Internet
17 when I viewed the video that was about me. How did you
18 see this? Well it's one of the comments that I scrolled
19 down to. Then they offer, you know, can you read that
20 comment to the jury? I mean something along those lines.

21 Obviously, if counsel jumps out of the box and
22 presents something to the jury that is of documentary
23 form that is not yet in evidence, plaintiff's counsel
24 might expect that I might get rather perturbed. I don't
25 expect plaintiff's counsel is going to do that, at least

1 I certainly hope not.

2 MR. DEAN: Your Honor, I just had one other
3 followup. I also assume that there will be some type of
4 exhibit, but what is the exhibit and who is the witness
5 who can actually say that it is what it purports to be?
6 Because I think copying and pasting comments on to a
7 document is -- suffers from authenticity problems.
8 Unless there's a witness who can say is this -- who can
9 actually sponsor the document and say that these were
10 comments that existed at the time, I think Ms. Teter
11 still has an authenticity problem. And because these
12 comments don't exist as individual snippets, they exist
13 on the web side, it's hard for me to fathom comment
14 number one that Ms. Teter, based on her testimony
15 reading these for a few minutes and stopping, that she
16 read comment one and comment 10,567.

17 So we don't have that context based on the cutting
18 and pasting that's been provided. So I still think there
19 are significant authenticity concerns just to show that
20 these comments are the comments that actually appear on
21 YouTube.

22 THE COURT: Well who at the plaintiff's table
23 wants to field this one?

24 MR. SASSER: Your Honor, I think there's an issue
25 beyond Ms. Teter reading the comments. Everybody read

1 these comments. Lots of people read these comments, and
2 that also led to her damages. People come up to her and
3 say things to her. She has the feeling that everybody
4 hates her from the kind of things that she reads about
5 herself. So it's not just --

6 THE COURT: That's an evidentiary minefield if
7 there ever was one. I quite purposefully steer away from
8 that particular theory of admissibility because the
9 foundation that you would be stuck having to lay for that
10 seems probably more of a burden than you'd be able to
11 surmount. I would think --

12 MR. SASSER: Your Honor, the fact that these
13 actually flowed directly from the video -- they were
14 appended to their video on their YouTube. They're not
15 put on a loop mix tape or Heidi Siegler's violin recital.
16 These things -- they were engendered by these people, and
17 the comments refer to Ms. Teter. I think there's a
18 pretty good inference that that's what they're looking
19 for.

20 THE COURT: I'm looking for a response to the
21 point Mr. Dean was making. And that is, how are you
22 going to be able to show what evidence -- what
23 foundational evidence are you going to be able to present
24 that a particular comment that you want to have her read
25 to the jury was something that Ms. Teter actually saw at

1 that time on that website that actually came from there
2 within the appropriate timeframe? How do you propose to
3 present that?

4 MR. SASSER: We'll ask her. Ms. Teter, did you
5 see these comments? Yes, I remember a couple of them.
6 One of them said I should be strangled with my oxygen
7 tube. Does it look like the one there in Number 7? Yes.

8 THE COURT: Well but you have these in documentary
9 form; correct?

10 MR. SASSER: We do, yes. There may be thousands
11 of them with regard to video one. And they deal with all
12 kinds of stuff like Scott Foval and Bob Campbell. Video
13 two is just about her. It's 300 comments, and I'd say 98
14 percent of them are negative. So there's no question
15 about them being representative. And they're not that
16 long -- that hard to read through unless --

17 THE COURT: You're planning to present all of
18 them?

19 MR. SASSER: No, Your Honor, just the ones that
20 she can identify if that's what we're limited to.

21 THE COURT: Well I want to make sure you
22 understand what I already said. And that is, you have a
23 serious 403 problem with regard to presenting a
24 cumulative amount of commentary because these are
25 purportedly comments from people who are unidentified.

1 You cannot authenticate them as statements of any
2 particular individual. For that matter, you don't know
3 that they came from an individual. You don't know that
4 they came -- you know, supposedly Ms. Teter would be
5 able to testify that she didn't post them. Other than
6 that, you have not eliminated the rest of the world as
7 being the source of these comments.

8 MR. SASSER: Yes, sir.

9 THE COURT: Therefore, the only 401 relevance that
10 I see is with regard to the impact that it has on her.
11 Therefore, I would only allow in for her to say there
12 were some comments that made me fearful. You know,
13 Ms. Teter, I show you Exhibit 65, The third line. Can
14 you read that silently? You know, yes. Is that one of
15 the comments that you saw that you're talking about?
16 Yes, it is. When did you see it? You know, the day
17 after the video was posted. Can you read it to the jury?
18 And you do that for maybe three comments or so to give
19 the jury a flavor of what she encountered. If you're
20 going to present 298 of these to the jury you're not
21 going to get anywhere near 298.

22 MR. SASSER: Yes, sir.

23 THE COURT: Because that -- I mean, at that point
24 it is so 403 overboard on something that is -- I don't
25 want to say that it's collateral to the suit, but it's

1 one small slice of the suit. And you don't want to spend
2 hours going through comment after comment.

3 MR. SASSER: Yes, sir. I understand.

4 THE COURT: Okay? We've been at this about two
5 hours and 20 minutes. We still have several motions in
6 limine to go through. I guess we'll go ahead and take a
7 short break this morning, and then we'll come back and
8 wrap up, and we'll get out of here before lunch.

9 Marshal, ten minutes please.

10 (Off the record at 11:13 a.m.)

11 (On the record at 11:26 a.m.)

12 THE COURT: The next motion in limine that I have
13 pertains to the transcript that was apparently prepared
14 regarding the raw video of Mr. Foval.

15 Mr. Dean, I'll turn to you because here is why I
16 don't understand your motion. In criminal trials I deal
17 with this all the time. I mean it's almost rote because
18 it is so common for the prosecution to be presenting a
19 wiretap, or even a video, of the defendant doing
20 something wrong. But a lot of times the sound quality
21 isn't that good so the prosecution always wants to have
22 that transcript that is simultaneously shown to the jury
23 while they're watching the video or listening to the
24 wiretap.

25 I give this almost rote instruction of, ladies and

1 gentlemen of the jury, you are going to be presented with
2 this video by the prosecution. At the same time, you are
3 going to be presented with what purports to be a
4 transcript of what is being said by the parties that you
5 will see in the video. It is my instruction to you that
6 the transcript is not the evidence. The video is the
7 evidence. If you discern that there is any discrepancy
8 between the transcript and the video you shall disregard
9 the transcript, and the video shall govern. I mean that
10 may not be verbatim of what I've said, but I've probably
11 said that a hundred times.

12 Isn't that exactly what we do here? It's in an
13 unusual context, but isn't that exactly what we do here?

14 MR. DEAN: No, Your Honor, for a few reasons.
15 One, we're using the word "transcript." And I don't know
16 what Your Honor receives in the criminal on the text, but
17 this is not a certified by anyone type of document. This
18 is -- I don't know if they use a court reporting service
19 or what type of transcriptionist service was used to
20 prepare it, but this is just a document where one person
21 sat down and purported to listen to it and write down --

22 THE COURT: That's all I'm talking about in the
23 other context. It's some clerical employee at the U. S.
24 attorney's office that sat down and tried -- or more
25 often at the DEA office that sat down and tried to figure

1 out what the party said.

2 MR. DEAN: In this context, Your Honor, both
3 sides agree that there are inaccuracies in the transcript
4 and phrases that can't be heard. Looking at the
5 transcript on its face to a jury is going to be confusing
6 because it has no names, it says SP name, SP two, SP
7 three. It doesn't say Scott Foval or Hartsock or
8 Campbell.

9 And what we're talking about here is I think this,
10 from many criminal cases, the exact words are actually
11 the dispositive thing. It's not about, you know, sort of
12 what other conduct was going on or the general import,
13 but exact words really matter in this case, and the
14 audio was clear but the transcript isn't. And in what I
15 think is --

16 THE COURT: I don't understand what that means.
17 If the audio is clear and the transcript isn't, what's
18 the purpose of the transcript?

19 MR. DEAN: Exactly, Your Honor. I agree a
20 hundred percent. The transcript is unnecessarily
21 confusing things for the jury when we can play the video
22 and they can hear it for themselves. I think where this
23 really becomes an issue is we saw in depositions, and you
24 will see when you have to go through the deposition
25 designations, questions of this form. Well did

1 Mr. Foval say X in the transcript? Did Mr. Foval say Y
2 in the transcript?

3 THE COURT: Again, just like the cautionary
4 instruction that I referred to earlier, the transcript is
5 not evidence. Therefore, if a witness is asked, whether
6 it's on the stand or in canned testimony, what did
7 Mr. Foval say in the transcript, that's not admissible.

8 MR. DEAN: Your Honor, I agree with you a hundred
9 percent. That's all I can say on that. I think that
10 that is the very use that we are concerned about. We are
11 concerned about a witness saying well I don't see
12 something in the transcript and the jury making
13 inference, well, then it wasn't said, when that's not a
14 supportable -- that's not a proper conclusion because the
15 recording itself is there.

16 THE COURT: Can you give me a particular example
17 of where that happens? And it doesn't need to be exact,
18 but just give me an example of how this comes up in the
19 case.

20 MR. DEAN: Right. Well Mr. Foval -- I don't
21 have the page and line in front of me; Mr. Montecalvo may
22 be able to show it to you. He was asked about what was
23 said. And he was looking at the -- you know, his
24 testimony was done exactly like this Your Honor. The
25 transcript was placed in front of him so he could follow

1 along, and he was shown video clips. And he frequently
2 said well that's not what the transcript says here. This
3 is wrong. What I actually said is X, so that is wrong.

4 Or with Mr. Hartsock they were -- you know,
5 questions were asked about whether certain words appear
6 in the transcript with reference only to the transcript.
7 With Mr. O'Keefe, questions were asked about whether
8 words appear in the transcript. The same problem happens
9 because we have summaries, you know, basically smaller
10 transcripts which the journalists themselves prepare of
11 the meeting that are just sound bites, bullets.

12 And questions are asked, well, does this -- does
13 this summary say, you know, Ms. Teter's name? Does it
14 say X, Y, or Z? And all of that testimony is misleading.
15 Because what is relevant is what is actually recorded,
16 and those two things don't align. So we would say any
17 testimony that's based on what is said in the transcript
18 and any argument or inference to the jury that, you know,
19 go back to the jury room and look at his transcript and
20 see if you -- you look for this word is.

21 THE COURT: Again, they're not going to have the
22 opportunity to go back to the jury room and look at the
23 transcript because it won't come into evidence. It is
24 merely an aid for them to view the video.

25 And I'd like for you to go back for a moment about

1 this whole point of how the transcript does not match up
2 to the video. What's the defect in the transcript?

3 MR. DEAN: Sure. Can Mr. Montecalvo read a
4 portion of Mr. Foval's testimony?

5 THE COURT: Certainly.

6 MR. MONTECALVO: Your Honor, to answer your
7 question, with the defect, this is how the examination of
8 Scott Foval was done. And this relates to the
9 designations and the objections to the designations so
10 this ruling would be helpful on this issue.

11 The way Mr. Foval's deposition was done is he was
12 presented with the transcript, and at times he was given
13 snippets of the video. And then it was confusing whether
14 he was referring to the transcripts at times, or whether
15 he was referring to the video. In fact, at one point in
16 the deposition Mr. Dean who was doing the examination
17 and said, are you looking at the transcript? He said no
18 I wasn't, but the video will show his eyes down.

19 And then on page 96 of his transcript the question
20 would be -- and this is just one example -- did I read
21 his statement or the statement in the transcript
22 correctly? And then he'd say yes, although I don't think
23 I actually said "yes" in that video. In that
24 conversation I don't think I said yes in between when I
25 was acknowledging his previous question. I think I was

1 nodding and Mm-hmm. I don't think I actually said yes.

2 THE COURT: But what does the video say.

3 MR. MONTECALVO: The video will actually
4 demonstrate what he said, whether he was nodding along,
5 when he was nodding along, whether he "Mm-hmm" which
6 court reporters deal with all the time, whether that was
7 a yes or whether that was, according to Mr. Foval, just
8 a nervous tick that he gave. The video is the best
9 demonstration of that. And to have a transcript come in
10 where he's able to testify based on that and adopt it
11 when he wants to and then run from it when he doesn't
12 want to. That's how the Foval deposition proceeded with
13 the transcript, and that's why it was confusing. That's
14 why we filed this motion.

15 THE COURT: Okay. Who at plaintiff's table is
16 going to field this? Mr. Sasser.

17 MR. SASSER: I will, Your Honor. I assume in the
18 cases that Your Honor has given those instructions to the
19 jury that those transcripts are offered by the
20 prosecution who's also offering the videotape or the
21 wiretap. Here they are trying to disavow their own
22 transcript. They signed it in their deposition -- in
23 their summary judgment papers. They quoted it at length
24 in their deposition -- summary judgment papers. In
25 Mr. O'Keefe's deposition I asked him questions. He kept

1 saying I can't answer that without looking at the
2 transcript. Ten times that happened. And at one point
3 --

4 THE COURT: What relevance does that have? What's
5 your point there? Because here, just like I have in all
6 of those cases -- and it comes up so often. If there is
7 a discrepancy between the video and the transcript, the
8 jury is specifically instructed the transcript isn't
9 evidence. Period. It's the video that's the evidence.
10 So if you have all of these questions about, well, what
11 does the transcript say? I don't care who's asking the
12 question. How does that come in.

13 MR. SASSER: Your Honor, the actual -- what
14 they're trying to prove here is what happened in the
15 meeting and not necessarily what's on the tape.

16 THE COURT: I don't understand what that means. I
17 thought the video is of the back and forth that has been
18 recorded on the video.

19 MR. SASSER: Right. But anybody can testify as
20 to what happened in a meeting. I was there and this
21 happened. And then somebody can say, yeah, but look at
22 this tape. This tape doesn't show that that's what
23 happened. The actual memory of the people who were there
24 are the best evidence. That's the -- we're not trying to
25 prove --

1 THE COURT: You're saying this transcript isn't a
2 transcript at all; that it's somebody's recollection of
3 what took place?

4 MR. SASSER: No, sir. I'm talking about just
5 witness testimony.

6 THE COURT: Then I don't understand where you're
7 going.

8 MR. SASSER: You've got witness testimony, you've
9 got video, and then you've got a transcript. The
10 transcript is of the video. If you were trying to prove
11 the contents of the video then the best evidence rule
12 applies. If you're trying to prove what happened in the
13 meeting you can still ask people about what happened in
14 the meeting without necessarily using the video. But
15 they --

16 THE COURT: That doesn't have anything to do with
17 the transcript. I am not understanding your argument at
18 all. Yes, there are circumstances in which the people,
19 the participants in the meeting can testify about what
20 happened at the meeting. Now there might be hearsay
21 problems with what was said, et cetera. But if the
22 question is what is on the video, and there's a
23 transcript, the video is evidence and the transcript is
24 not.

25 MR. SASSER: That's correct, Your Honor. But the

1 transcript was also a statement by a party. It's their
2 transcript. They created it. They relied on it in their
3 depositions for giving testimony.

4 THE COURT: Transcript of the defendants as to
5 what? As to the contents of the video?

6 MR. SASSER: As to what happened. I would ask --

7 THE COURT: Again, I'll ask you the same question
8 that I was asking Mr. Dean a few minutes ago. Give me
9 an example of where you have a situation where you have a
10 quote, unquote transcript about what happened that is
11 somehow not on the video that the transcript is
12 supposedly a transcript of? That makes no sense to me.

13 MR. SASSER: I asked Mr. Foval, was -- I'm
14 sorry. I asked Mr. O'Keefe was Mr. Foval talking about
15 Shirley Teter? Yes, he was. Well did he say her name?
16 I would have to see the transcript. And then we'd trot
17 out the transcript. He looked at it for 13 minutes,
18 without stopping, looking for Shirley Teter's name. He
19 was relying on it. And if he used it to rely on it, I
20 think it's evidence that comes in. The witness was using
21 a particular document to bolster his testimony. They
22 quoted it throughout the deposition in their summary
23 judgment papers, Your Honor.

24 THE COURT: What does that have to do with the
25 evidentiary issue?

1 MR. SASSER: It's a statement by them. It's an
2 admission by the party. All admissions by parties are,
3 by definition, not hearsay. So they should be -- it
4 should come in.

5 THE COURT: Well I don't perceive, at least, that
6 the objection is being made based on it being hearsay. I
7 understand that the objection is being made as to really
8 two grounds. One is authenticity. Because if it
9 purports to be a transcript it has to actually transcribe
10 what was said. But, secondly, under the best evidence
11 rule. The best evidence of what is shown on a video is
12 the video. It's not seen the transcript. I see both of
13 those as being very relevant points.

14 MR. SASSER: The videos aren't great, Your Honor.
15 I don't know if you've seen any of them, but they're --

16 THE COURT: We're talking about the two videos
17 that are at issue, or we're talking about the stock
18 footage?

19 MR. SASSER: The stock footage.

20 THE COURT: Okay. I have not seen that.

21 MR. SASSER: So it's 2.5 hours. They're using
22 hidden cameras shooting through buttonholes, and
23 sometimes the person who is talking is on the screen;
24 sometimes you're just looking at the ceiling.

25 THE COURT: Just like the videos that the DEA

1 agents take. That's the thing. This is just what I see
2 all the time, and I never get any argument about this.
3 That's why I feel like there's must be something I'm
4 missing here to be hearing these arguments, because it
5 sounds like what at least the prosecutors in the criminal
6 defense bar think is just normal everyday stuff. So
7 explain to me why it's not.

8 MR. SASSER: Because they're walking away from
9 their transcript. I assume the prosecution puts in both.
10 Right? I assume. These guys want to get away from what
11 they use throughout discovery and now go --

12 THE COURT: You keep talking about discovery.
13 We're talking about admissibility of evidence. If the
14 video says today is Thursday, and their transcript says
15 today is Wednesday, is that an admission of a party
16 opponent that the video says today is Wednesday? Is it?

17 MR. SASSER: It's an admission of what they said,
18 not of what the video said.

19 THE COURT: But it's a transcript purportedly of
20 the video. Why doesn't the best evidence rule keep that
21 out?

22 MR. SASSER: In that situation, if you're talking
23 about what's in the video, I think the best evidence rule
24 does apply. I do have a case -- we cited a case here
25 that's consistent with what Your Honor was discussing in

1 the criminal context. The *Breezy Point* case. This says
2 nothing in Rule 1002 prevents introduction of a
3 transcript to aid a jury in following the recording if
4 the original recording is available for the Court's
5 inspection. I don't know when they said it helps the
6 jury. I don't know if that means admissible or they just
7 see it at the time.

8 THE COURT: Right. And that's exactly the way
9 it's always done. It is allowed to be shown to the jury,
10 but the jury is specifically instructed the transcript
11 isn't evidence because of the best evidence rule. It's
12 merely an aid to the jury in viewing the video.

13 MR. SASSER: Thank you, Your Honor.

14 MR. STREZA: Judge, if I could just answer or
15 respond to one thing that Mr. Montecalvo said. I took
16 the deposition of Mr. Foval, and that transcript was
17 used predominantly in the way that you have described it
18 to be used. It was used to help him understand inaudible
19 testimony he was giving or statements he was giving as
20 well as the interviewers were giving in that situation.

21 THE COURT: Give me an example of what you're
22 talking about. In other words, the video is inaudible
23 and you can't hear what was said, but then when asked
24 about it Mr. Foval said what?

25 MR. STREZA: The transcript reflects what I was

1 trying to say, Your Honor. Or he would say the
2 transcript says what you cannot hear. So that would
3 refresh his recollection as to what happened in the
4 video. I can't give you an exact --

5 THE COURT: Is it in terms of the refreshed
6 recollection?

7 MR. STREZA: Yes.

8 THE COURT: In other words, Mr. Foval you see
9 this part of the video. Can you hear what was being
10 said? No, I can't, it's inaudible.

11 MR. STREZA: Does the transcript help you in any
12 way? And he would say yes it does.

13 THE COURT: Will it help you in any way, or did
14 you ask does it refresh your recollection?

15 MR. STREZA: Yes, Your Honor.

16 THE COURT: What was said? Before you refresh his
17 recollection there do you ask him, do you remember what
18 was said?

19 MR. STREZA: I believe that's the case, Your
20 Honor. I can't give you the line or the page at this
21 time.

22 THE COURT: You either go through the paces or it
23 doesn't come in. You know how this works.

24 MR. STREZA: Gotcha. I didn't want the Court to
25 leave today thinking the use of the transcript at the

1 deposition was entirely inappropriate and it was not.

2 THE COURT: You know, apparently, I'm going to
3 have to -- you're going to make me read this 1,700 pages,
4 aren't you, to where I'm going to have to go through item
5 by item. Basically speaking, that transcript is going to
6 be a very limited use. I've told you the general limited
7 use which is going to be allowed. But beyond that there
8 is a significant foundation that has to be laid, and
9 that's part of what Mr. Streza has been talking about
10 here.

11 If there is a portion of the video that is
12 inaudible, and then there is a transcript that is
13 prepared by someone who was there that says well you
14 can't hear it on the tape but what he said was X, then,
15 you know, there is that narrow exception to where it may
16 be substantive evidence there. But I mean that -- it's
17 going to be hard to pass that camel through the eye of
18 that needle.

19 Mr. Dean.

20 MR. DEAN: A couple questions. One, I would --
21 just to be clear, this transcript was not prepared by one
22 of the journalists. It was prepared by a third party.
23 So I'm not sure where it's an a situation where the video
24 was ininaudible and the transcript is more complete that
25 I think would be anomalous. So to understand what your

1 instruction is Your Honor. I understand you to say that
2 the transcript itself does not get submitted as evidence
3 to the jury, and that if a witness is being asked
4 questions based on the transcript that that also is
5 inadmissible. I think those were our fundamental
6 questions.

7 THE COURT: Without any further foundation, that
8 is correct.

9 MR. DEAN: Thank you.

10 THE COURT: The foundational exception would be
11 that very narrow exception that Mr. Streza was just
12 addressing.

13 MR. SASSER: Your Honor, I completely forgot to
14 address Rule 1007 which says that if it's a statement --
15 a written statement of party it may be used to show the
16 contents of the recording.

17 THE COURT: It says what?

18 MR. SASSER: A proponent may prove the content of
19 a recording by the written statement of a party against
20 whom the evidence is offered. We're offering it against
21 Veritas. And I think this is a statement by Veritas
22 since it's -- they're the ones who had it prepared.

23 THE COURT: Well and again this is going back to
24 the very narrow exception that Mr. Streza was just
25 talking about, unless I'm misunderstanding your argument.

1 First of all, the best evidence rule says it's the
2 recording that is the evidence. So if the recording says
3 Thursday, you can't refute that by some other evidence.

4 However, if the recording is inaudible and the
5 defendant's statement of what was said was Wednesday,
6 then you can use that so long as you've laid that
7 foundation. That's 1007. You can use it as substantive
8 evidence under those circumstances but you cannot use the
9 writing to in fact refute what is in the best evidence.

10 MR. SASSER: Your Honor, I think both parties
11 have addressed Rule 1007. I would just urge the Court to
12 look at it and see to the extent to which it is an
13 exception to Rule 1002. It seems to me that testimony or
14 statement by a party may be used against it, and it says
15 the original doesn't even need to be accounted for.

16 THE COURT: Well you say doesn't need to be
17 accounted for. That's different from the fact that it
18 contradicts it. Under the best evidence rule you cannot
19 contradict the best evidence. I mean the circumstance in
20 which that might come up more often is if there is, you
21 know, the document, the lease, or whatever, that is at
22 issue, and one of the parties has his notes as to what
23 the lease contains. And you say well the lease may say
24 this it's for one year but the defendant's notes say that
25 it was for three years. Does that change the terms of

1 the lease? Of course not. If you can't find the lease
2 and you're suing on the lease, and the defendant's notes
3 to the extent that they might otherwise be admissible say
4 it's a three year lease, that's then substantive evidence
5 usable against the defendant that it's a three year
6 lease.

7 MR. SASSER: Okay.

8 THE COURT: I feel like I must be missing
9 something because, to me, it seems so simple, and you
10 seem very whetted to the idea that it's more usable than
11 I think it is.

12 MR. SASSER: I was just looking at the actual
13 language of 1002 and 1007, and there's nothing in there
14 about contradict contradicting the other. Your Honor,
15 the example Your Honor was giving kind of is a corporate
16 example. When there is a -- when you come to a contract
17 all the other stuff is excluded and I keep trying to
18 think of the term.

19 THE COURT: Parole evidence rule.

20 MR. SASSER: Parole evidence rule. Yes, sir,
21 Your Honor.

22 THE COURT: Yeah. If you don't have the document.

23 MR. SASSER: There's another term that the
24 parties use when -- at the end of the contract with stuff
25 about using North Carolina law that -- there's a term

1 that everything that's in the contract itself is subsumed
2 from all of the negotiation.

3 THE COURT: Well I think I've been clear as to
4 where I stand on this one. It can be can be shown to the
5 jury in conjunction with the showing of the video. If
6 there is any point at which the video is inaudible then
7 the transcript can be offered as substantive evidence
8 only as to the inaudible part against the defendant if
9 you lay a foundation that the defendant in fact prepared
10 it.

11 The next item I have here is with regard to the
12 Foval deposition. It seems like there were various
13 things here including what we were just talking about a
14 moment ago. Just looking at my notes, if I'm
15 understanding the question here correctly, it has to do
16 with where Mr. Foval is shown a portion of the video and
17 then is asked, well what did you mean? Is that a fair
18 rendition of what the question is at least?

19 MR. MONTECALVO: That's correct, Your Honor.
20 That takes what we were just arguing one step further is
21 that he was then asked not what's on the video. He's
22 then asked, what did you mean? What did you say? And I
23 have various examples that I looked at from the
24 transcript. The way the deposition flowed was that
25 Mr. Foval was asked questions setting up the meeting

1 that led to the video, all appropriate. Who were you
2 meeting with that day? What were you wearing? What was
3 the other side wearing? That's admissible.

4 What the motion in limine relates to is where
5 Mr. Foval is getting into what he meant by those words.
6 Sometimes what the people he was talking about that he
7 was talking with, the journalists, meant when they were
8 asked him the questions he was asked. Once they set up
9 the meeting in the deposition they started asking Mr.
10 Foval questions about what was said.

11 The questions are, what were you referring to?
12 And his answers at some points would be I was explaining.
13 Question, would be what did you state? One question was,
14 what did Mr. O'Keefe state? These are all relating to
15 the video.

16 THE COURT: I'm not understanding the context
17 here. Is he being asked what is shown on the video, or
18 is he being asked what is your recollection of what took
19 place in this meeting without reference to the video?

20 MR. MONTECALVO: No. He would be shown the
21 actual clip of a video. So Mr. Streza would show
22 Mr. Foval a portion of the video and say, okay, we've
23 now listen today that video. What did you say on that
24 video? And at times it bleeds into the last argument:
25 What does it say on the transcript?

1 THE COURT: Well I mean -- I need to understand
2 your -- the point that you're raising here. Is it that
3 Mr. Foval is now changing what he said? In other words,
4 on the recording he says it's Thursday, and Mr. Streza
5 asks him so what did you say on the recording? And he
6 says well I said it was Wednesday. Is that the sort of
7 thing that we're talking about? That he's changing the
8 content of the video?

9 MR. MONTECALVO: That's precisely it. There's
10 portions where he was changing what he said based on what
11 was on the video. Many of our designations, and our
12 objections to the designation in the Foval transcript,
13 relate to that line of questioning where he's shown the
14 video and then he's asked then to interpret what it was
15 he said what it was he meant and, you know, did you say
16 that? We think that that's the jury domain is that, as
17 Your Honor said early in this pretrial, you have the
18 video. You have the video. They have the video and we
19 presented the video. There are -- it's a long video, but
20 that video is the best evidence of what's there. And for
21 Mr. Foval then to be able to contradict and state what
22 he real really intended to say as opposed to what he
23 actually said is not probative of any issue in the case.

24 THE COURT: Well that gets into a totally
25 different issue, doesn't it?

1 MR. MONTECALVO: That was also the basis of our
2 motion in limine too. To the extent that there's some
3 benefit to Mr. Foval then having a catharsis of what he
4 wanted to say in that meeting, or what he really -- how
5 the other side should have interpreted it instead. He's
6 now allowed to just explain the video for the first time
7 what it was that he meant.

8 Questions would be asked: How did you respond?
9 What did he ask? Those are the types of questions that
10 the video is going to be very clearly showing what he --
11 how he responded and what he asked, and it would be
12 cumulative. It certainly would be a waste of time. And
13 in this case, for the Foval transcript, it would reduce
14 out a large portion of how that questioning went.

15 THE COURT: Do I understand correctly that the
16 Foval deposition that we're talking about was the de bene
17 esse deposition on video for the purposes of preserving
18 it for trial?

19 MR. MONTECALVO: That's correct, Your Honor.

20 THE COURT: So we have this juxtaposition of the
21 video clips, and then Mr. Foval either explaining what
22 he said or modifying what he said. Is that --

23 MR. MONTECALVO: That's correct. And that's why
24 these designations are particularly important.

25 THE COURT: Okay. Well let me hear from the

1 plaintiff's side.

2 MR. SASSER: Your Honor, their very defense to
3 this lawsuit is we thought he was talking about Shirley
4 Teter. We understood he was talking about Shirley Teter.
5 I think Mr. Foval is entitled to say whether or not he
6 was talking about Shirley.

7 THE COURT: What relevancy does that have?

8 MR. SASSER: Whether he was talking about Shirley
9 Teter or not.

10 THE COURT: What he meant not what he said. What
11 he meant. What relevance does it have?

12 MR. SASSER: Who he was talking about was
13 somebody other than Shirley Teter; I think that's
14 relevant. If he says --

15 THE COURT: I asked you what relevance does it
16 have, and your answer of "I think it's relevant" doesn't
17 really answer my question.

18 MR. SASSER: Who he was talking about is relevant
19 if it's not Shirley Teter.

20 THE COURT: How? What's the relevance of it?
21 What element of your case does that go to? And let me
22 refine my question because I seemed not to be
23 communicating it very clearly here. You have person A,
24 Foval, communicating to reporter and he says A, B and C.
25 Reporter says, wow, I've got a story. He said A, B and

1 C. And reporter then goes and writes a story based on A,
2 B and C. Foval comes back later and said well I didn't
3 really mean A, B and C. I meant X, Y and Z. What
4 relevance does that have to what that reporter wrote?
5 The reporter wrote Foval said A, B and C.

6 MR. SASSER: Here the reporter took M, V and A
7 and put it in that order involving things that were not
8 even at that conversation.

9 THE COURT: Okay. And that may be part of what
10 your claim is based on. But for Foval then to go and
11 say, by the way, all the things I didn't say are these.
12 How is that relevant to the claim of whether or not the
13 product that was provided, the final document, the video,
14 is in some way defamatory.

15 MR. SASSER: What Foval was going to be saying
16 is, okay, when I'm wearing the checked shirt I wasn't
17 even talking to Brittney Rivera. That was several months
18 earlier. I certainly could not have been talking about
19 Shirley Teter because nobody in the world knew who she
20 was until she got hit at the Trump rally. He can say
21 these are three different videos and these got jumbled
22 together. And he can also say what were the
23 circumstances under which he was asked the question
24 because they cut stuff. He can say look --

25 THE COURT: So there are pieces missing from the

1 video.

2 MR. SASSER: From video one and video two, Your
3 Honor.

4 THE COURT: I'm talking about the video that's
5 being shown to Mr. Foval in his deposition.

6 MR. SASSER: I think some pieces of that may be
7 missing. Mr. Bernie testified that in his deposition
8 that video was disclosed to us half a month after
9 discovery closed. Because what they had given us was of
10 such poor quality it came in 15-, 20-second snippets.
11 This was the one that I think thing nobody really got to
12 consider here during the discovery period itself. That's
13 why we were relying on the transcript. So Mr. Foval can
14 say --

15 THE COURT: Again you have me confused. I thought
16 the Foval de bene esse deposition was taken here just
17 within the last few weeks.

18 MR. SASSER: Yes, it was, Your Honor.

19 THE COURT: So what does that have to do with what
20 you had months earlier or even after the close of
21 discovery? I don't understand. Your comment made no
22 sense to me.

23 MR. SASSER: Okay. What Mr. Foval is talking
24 about is about -- he was also shown video one and video
25 two and was asked, what was going on there? Were you

1 allowed to -- is this your entire sentence? No. And
2 then you go back to the video that they're talking about
3 that they produced in December, and he was able to say,
4 see, I was asked and this is my whole answer. And over
5 here on video one they cut that part out. I think that's
6 pretty important for the jury to be able to understand.

7 THE COURT: Again, I feel like we're talking in
8 two different universes here. For Mr. Foval to be shown
9 a snippet of a video and then asked is that all of what
10 you said and he says no, they cut off the second half of
11 that sentence, and then a video is shown of the entire
12 sentence. I think that's admissible.

13 I think it might be going around your elbow to get
14 to your nose, but it -- the ultimate point is that the
15 actual statement by Foval was truncated for whatever
16 reason.

17 MR. SASSER: Yes, sir.

18 THE COURT: I can see how that might be relevant
19 to the issue of defamation. But for Foval to say, yeah,
20 it says Thursday on the video but I really said
21 Wednesday, that -- that doesn't come in.

22 MR. SASSER: Let me make this clear. I do not
23 want to do that. I do not want him to contradict what he
24 said, and we're not offering it for that. We're offering
25 him -- I would like to be able to ask -- explain the part

1 where he says, were you -- did you mention the words
2 "Shirley Teter?" And he says no. If I misunderstand the
3 defendants, they want to show the 2.5 hours of video so
4 that the jury can determine whether he said the words
5 "Shirley Teter" or not. I'd like to be able to just cut
6 to the chase on that and have him say I did not say
7 "Shirley Teter." We've probably got two or three clips
8 of him saying that in his deposition.

9 THE COURT: That falls into the category of not so
10 much the rules of evidence but sort of the manner in
11 which trials are ordinarily conducted.

12 MR. SASSER: Yes, sir.

13 THE COURT: If the defendants want to be utterly
14 obstreperous I can see where they might say, no, we're
15 going to have to play that whole 2.5 hours. But I don't
16 know too many lawyers who would make that objection
17 because it's just going to tick off the jury.

18 MR. SASSER: There's another issue not talking
19 about what he meant but why he said certain things. Why
20 did you say uh-huh when you were asked this? And he.

21 THE COURT: That's an explanation as well. That
22 goes outside of the scope of what he said on the video.
23 Again, it's outside of the scope of what he communicated
24 to the reporter. How is that relevant?

25 MR. SASSER: It's relevant in that he -- they did

1 not get the names out -- get from him what they were
2 trying to get him to accomplish. They were trying to get
3 him to say words like "violence," and "Shirley Teter,"
4 and they succeeded on one but they did not succeed on the
5 other. And it goes down to whether it's an issue of
6 truth. Was it true that they were talking about Shirley
7 Teter? If they're --

8 THE COURT: Again, I understood that point. But
9 where he said on the video -- said as part of the
10 discussion with the reporter A, B and C, and then he's
11 asked in the deposition well what did you mean? And then
12 he testifies in substance I didn't tell the reporter X, Y
13 and Z but that's what I was thinking. I don't see where
14 that has any relevance because that's something that was
15 not communicated to the reporter. It cannot be part of
16 that reporter's formulation of a statement which you are
17 now claiming is defamatory. It is outside of that box.

18 MR. SASSER: Well physical -- if the jury is
19 shown video one that makes it sound like he is talking
20 about Shirley Teter being one of his activists, and they
21 say we understood that and we're able to have Mr. Foval
22 say no that was half of a sentence and, oh, by the way,
23 they did not put in the sentence where I said we never
24 paid anybody go get beaten up. That goes to their
25 recklessness in taking certain of his things out of the

1 video when they created video one.

2 THE COURT: Again, that's a totally different
3 situation from what you were describing a moment ago
4 where he is saying I told them A, B and C, and they put
5 that in the video. I also told them D, and here it is on
6 the video clip. I mean that's part of what was
7 communicated to the reporter. Therefore it goes to the
8 issue of whether or not it goes to the defamatory
9 editing.

10 MR. SASSER: That's what it goes to the recorder.

11 THE COURT: Have I given you all enough guidance
12 to what I'm going to let in and what I won't?

13 MR. SASSER: As I understand it, you're not going
14 to let him say what he meant. You're going to let him
15 say what was said and what was not said what went in the
16 video one, and that was -- or what did not go into video
17 one that he had actually said, and what had got cut out.

18 THE COURT: I'm not going to let him say what he
19 meant, and I'm not going to let him say what is at
20 variance from what it shows on the video what he said.

21 MR. SASSER: Thank you, Your Honor.

22 MR. MONTECALVO: Your Honor, if I could be heard
23 on that point lastly? /

24 THE COURT: Just a second. You may.

25 MR. MONTECALVO: Thank you. Your Honor, I think

1 there might be some efficiency to discuss this issue just
2 a little bit further. Part of the issue we have with the
3 way Mr. Foval's deposition was conducted, with snippets
4 from the raw video, is I think going to be one of the
5 challenges that we also have at trial. As Mr. Sasser
6 mentioned, we have two hours of that raw video. The
7 defendants don't desire to play all two hours of that
8 video.

9 However, if the defendants are going to be accused
10 of selectively editing and defamatory editing, then there
11 does need to be significant context around the statements
12 when a witness is asked questions at trial, which is
13 essentially what the Foval deposition said, when the
14 witness is asked questions about it doesn't say anything
15 in there about this does it? And there may be something
16 30 minutes before, 30 minutes after, that does -- I think
17 the completeness doctrine would allow us to put in
18 without trying to be obstreperous about that put in the
19 entire video. We don't desire to do that. And I think
20 that we can reach some type of reasonable accommodation
21 with the plaintiff so that --

22 THE COURT: I mean that's all an issue of trial
23 tactics. That's not an issue of evidentiary
24 admissibility. Go ahead.

25 MR. MONTECALVO: I'm sorry.

1 THE COURT: Go ahead.

2 MR. MONTECALVO: I think what we're going to see
3 in the designations from Foval is there may be some
4 designations being done by the plaintiff based on what I
5 understand Your Honor's ruling to be. But where -- we
6 have issues with how they picked the snippets from the
7 raw video they picked. So, in other words, the video is
8 two hours long. They have picked a snippet to ask
9 Mr. Foval about for a minute or two, and he's asked
10 questions about that. That's not going to be appropriate
11 for trial to show the completeness and to show that
12 answer. I think we would have an opportunity to present
13 the context around that video. That's going to be very
14 difficult to do in trial if we make that objection, and
15 if Your Honor sustains it, that we're allowed to play
16 some of that at that time if we haven't worked --

17 THE COURT: Why at that time?

18 MR. MONTECALVO: Well I think that's -- that's
19 what the -- that's my understanding of how that would
20 work is that if they're going to play a portion or read a
21 portion of a transcript, in the sake of completeness they
22 would need to read the rest of it at that time.

23 THE COURT: Maybe I'm not understanding what you
24 have in mind.

25 MR. MONTECALVO: Well I think --

1 THE COURT: Here is kind of how I was envisioning
2 where you were going with this. That a 15-second clip of
3 the video, the raw footage, is played to Mr. Foval, and
4 then he's asked: You didn't say anything about the time
5 square bombing, did you? He says, no, I didn't say
6 anything at all. But, in reality, 30 minutes later in
7 the raw footage, he did talk about the time times square
8 bombing.

9 Are you saying that rather than presenting some
10 sort of rebuttal or defense evidence that says, you know,
11 that puts into evidence that portion of the raw footage
12 that completely undermines what Mr. Foval said, you want
13 to with be able to put it in as part of his testimony?

14 MR. MONTECALVO: I believe at that time that
15 they're obligated to provide it at that time so it's not
16 a confusing answer and that the answer is complete at
17 that point.

18 THE COURT: Why didn't you cross-examine him about
19 it?

20 MR. MONTECALVO: We didn't have the snippets
21 ahead of time. And we did cross-examine him about part
22 of it. But it's not something you're able to do in a
23 deposition on the fly; and it's an objection that I think
24 we preserved.

25 THE COURT: I mean how would you have done it at

1 trial to say right then we think -- you want to be able
2 to play a much broader snippet?

3 MR. MONTECALVO: I think if -- that's correct.

4 THE COURT: Even if it's a snippet that's 30
5 minutes later in the video?

6 MR. MONTECALVO: I think that's correct, Your
7 Honor. If it's 30 minutes later then we would be able to
8 play up until that point. But this was a de bene esse
9 deposition and, as such, we would have had that advanced
10 knowledge of what was going to be played and we would
11 have been able to make that. Because it was still in
12 deposition format we preserved that as an objection that,
13 you know, as to how he was asked questions on those
14 snippets.

15 THE COURT: Well I'll take a look at those issues
16 in the transcript. Generally speaking, where it's the
17 next sentence then, yes, the rule of completeness says
18 you need to show him a little bit more. Where it's 30
19 minutes later you don't get to interrupt the flow of a
20 direct examination by saying, well, let's listen to the
21 next 30 minutes of this video to see if that's correct.
22 I've never seen anybody want to do that sort of thing
23 because, again, part of this is trial tactics. But you
24 don't want to tick off the jury, and you sure don't want
25 to put them to sleep.

1 You save that for cross- examination, and on
2 cross-examination you say, now, Mr. Foval, on direct
3 examination you said that you didn't say anything about
4 the Times Square bombing. That's what you said, isn't
5 it? Oh. Yes, that's what I said. Well let me show you
6 part of this video right here. You play the video and
7 say, Mr. Foval, what you said before wasn't true, was
8 it? I mean that's how you do it; right?

9 MR. MONTECALVO: Except Mr. Foval is not going
10 to be at trial.

11 THE COURT: Well that's the problem with the de
12 bene esse deposition. When you've got it in the can,
13 you've got it in the can. You have other ways you can do
14 it. You can put it on through a different witness who
15 can explain something about what's in the raw footage.
16 There are other ways to do it. But you kind of have one
17 opportunity to do it, and you missed that opportunity.
18 That doesn't mean that you're out of luck.

19 MR. MONTECALVO: Thank you, Your Honor.

20 MR. SASSER: Your Honor, I just want to make sure
21 that this ruling applies to everybody in that
22 conversation. If they bring in their people to say what
23 they meant in the conversation or what they understood
24 they're still bound by the words of the transcript and
25 they can't come in and do anything that Mr. Foval.

1 THE COURT: I'm not understanding the context in
2 which you're asking this question.

3 MR. SASSER: There were three people in that
4 conversation on September 15th 2016: Mr. Foval,
5 Christian Hartsock, and Brittney Rivera, two of their
6 employees, the people who take everything down. I want
7 to make sure Your Honor's ruling with regard to what
8 Scott Foval said, or can be allowed to be played on his
9 deposition, is going to be consistent with what they were
10 going to be allowed to say in front of the jury.

11 THE COURT: Well, I mean, again, keep in mind, the
12 rules that you're wanting to apply here are also supposed
13 to be the same rules that apply to the New York Times and
14 CBS and MSNBC and Fox News. So when you're talking about
15 the reporters here, when they are taking this raw
16 information, just like the reporter from the New York
17 Times interviewing some cabinet member and then taking
18 from that cabinet member and writing down what they
19 believe to be the reasonable inferences from what was
20 said. That's relevant to whether or not what they write
21 is defamatory.

22 So there are two components here in the creation
23 of the product. One is what is communicated. Secondly
24 is what is the reasonable inference from that
25 communication. The speaker's reasonable inference or

1 what the speaker believes the hearer should have drawn as
2 a reasonable inference is irrelevant to that process.
3 The reporter's inference that is drawn in the preparation
4 of the product could potentially be very relevant.

5 So, I mean, we're talking about two different ends
6 of that communication chain. It seems to me like you're
7 saying well the same rule applies at both ends, doesn't
8 it? Well, no, it doesn't. It's two totally different
9 things at least in the context of an allegedly defamatory
10 product. Does that make sense? Have I said that in a
11 way that makes sense.

12 MR. SASSER: I understand what Your Honor says.
13 I'm just wondering to what extent Mr. Hartsock is going
14 to be able to say. You know, he said that and I thought
15 this and, you know, what is the relevance of what he
16 thought?

17 THE COURT: Well with no more context than that, I
18 don't know that it has any relevance.

19 MR. SASSER: Thank you, your Honor.

20 THE COURT: If he says I drew a reasonable
21 inference from the specifics of what Mr. Foval said, and
22 that's what I put into the individual video, then it
23 might be very relevant.

24 THE COURT: Do we need to do anything else with
25 regard to the Foval deposition?

1 MR. MONTECALVO: No, Your Honor.

2 THE COURT: The next thing I had was with regard
3 to journalistic standards. Here's the question I have.
4 I don't know who is fielding this question on the
5 plaintiff's side. As I understand it, unless we get into
6 an actual malice standard it is a negligence standard.
7 This isn't like a medical malpractice case where you put
8 on evidence about the standard of care for an
9 orthopedist. It is a reasonable man standard; the way
10 that an ordinary person would act under the
11 circumstances. And if there is a breach of that ordinary
12 person standard then there is potential liability.

13 With that in mind, what is the relevance of some
14 exterior standard, some exterior source? I mean I could
15 see where it is in a professional malpractice case but
16 this isn't a professional malpractice case.

17 MS. RINI: Your Honor, we would agree that this
18 is not a professional malpractice case. However,
19 defendants have argued that they are journalists and they
20 act as though they abide by journalistic rules, and for
21 that reason it would be important to show that they do
22 not follow those rules.

23 THE COURT: Well you say it would be important to
24 show that. What is the relevance? Tie it to one of the
25 elements of what you have to prove as to your case in

1 chief.

2 MS. RINI: To show negligence you have to show
3 that a reasonable person, in the same situation or
4 similarly situated to the defendants, would not have done
5 what they did. I think that it would be relevant to show
6 what a journalist or someone -- I'm not saying that we --
7 we do not agree that defendants are journalists but
8 persons --

9 THE COURT: Well but and I gathered that from what
10 you have written here, and that's the source of my
11 question. It seems to me from what you've written that
12 you want to have it both ways. That you want to say well
13 they're not journalists but they should be held to the
14 standard of journalists because they're negligent if
15 they're not held to the standard of what they're not.
16 Explain to me how that makes any sense.

17 MS. RINI: I guess if the Court were to determine
18 that they were journalists then evidence of journalistic
19 norms would be relevant. If the Court were to determine
20 that they were not journalists, journalistic norms would
21 inform the jury on what typically happens when you
22 publish news articles.

23 THE COURT: Well don't you have to present
24 evidence as a foundation for the presentation of this
25 evidence? In other words, don't you have to prove that

1 they are in fact journalists in order to get into
2 evidence journalistic standards? And if you put on
3 evidence that they're not in fact journalists then how do
4 you get it in?

5 MS. RINI: I guess you're right, Your Honor. I
6 don't think we'll be introducing evidence that they are
7 journalists.

8 THE COURT: Okay. So then what's going to happen
9 with this evidence about the standards?

10 MS. RINI: It's only in the event that they say
11 that they are journalists because they will be testifying
12 that they're journalists.

13 THE COURT: I can see where this might be some
14 cross-examination material.

15 MS. RINI: In that case we would want to
16 introduce evidence of journalistic norms, and for that
17 reason it would be relevant.

18 THE COURT: Well, again, you say introduce
19 evidence of. I was saying cross-examination of them
20 which is not to split too fine a hair there. But I can
21 see where if they hold themselves out as journalists that
22 you might want to impeach them as journalists.

23 MS. RINI: Correct, Your Honor.

24 THE COURT: Mr. Dean, Mr. Montecalvo, do you want
25 to respond to that at all?

1 MR. MONTECALVO: To that point, I think Your
2 Honor has that one. It's just a matter of how this came
3 in and the way it came in and about whether the
4 defendants were journalists or not was on direct
5 examination asking the defendant representatives and the
6 defendants questions about whether they were journalists,
7 and how did they consider themselves journalists when
8 they do X. And I think based on what Your Honor is
9 inclined that none of that is going to come in on that
10 direct testimony.

11 THE COURT: Okay.

12 MR. MONTECALVO: Thank you.

13 THE COURT: The next one that we have here is the
14 evidence of malice or recklessness. Let me turn here to
15 Mr. Dean or Mr. Montecalvo. It seems that the
16 plaintiff's claim here is based in part on malice -- an
17 assertion of malice. So why shouldn't that be relevant?
18 Or have I misunderstood your motion.

19 MR. MONTECALVO: Your Honor, you are correct that
20 the malice -- the analysis on malice is going to come in
21 to this case. Whether it's per quod or whether it's per
22 se, it's not that we're trying to exclude evidence
23 relating to malice. What we're trying to exclude with
24 this motion is specific types of evidence relating to the
25 way that we expect that the plaintiff is going to attempt

1 to prove malice, and those are set out in the bullets on
2 Page 18 and 19 of the motion. Each one of these issues
3 comes from the Fourth Circuit decision stating, as such,
4 that profit motivating the ill-will towards Ms. Teter.
5 None of these things should come in in this way under the
6 guise that they're trying to prove malice.

7 For example, the first one is insensitivity to the
8 plaintiff's reputation or career. The question was asked
9 of the defendants, was this fair to Ms. Teter? And
10 based on that they're going to say that the defendants
11 didn't care that Ms. Teter was going to be potentially
12 defamed as a result of this, and they're using that as a
13 back door way to prove malice in much the same way.

14 THE COURT: I'm not understanding what you mean by
15 a back door way of proving malice. Because that sounds
16 like sort of a front door way of avenue.

17 MR. MONTECALVO: That's a front door way. That's
18 correct, Your Honor.

19 THE COURT: Malice is an element of the claim
20 they're making, both with regard to liability and
21 potentially with regard to punitives. So why wouldn't
22 that come in?

23 MR. MONTECALVO: Well just that specific about
24 how it was fair to Ms. Teter and is something that was
25 covered in Reuber. In that decision, there was

1 specifically that ill-will toward the plaintiff is not a
2 relevant factor into the malice standard under the Fourth
3 Circuit law.

4 THE COURT: Well but there -- and remind me if I'm
5 getting this wrong. There wasn't it seeking to elicit
6 testimony specifically about that? You know, isn't it
7 true that you hated the plaintiff? That sort of
8 questioning. Whereas, here the particular things you're
9 talking about are, isn't it true that you hated
10 Ms. Teter? It was questions about well, you know, isn't
11 it true that you put this together in a way that you
12 didn't care whether this hurt her or not? And why isn't
13 that malice?

14 MR. MONTECALVO: Well I think that's -- it's the
15 insensitivity. And that's what the *Reuber* case states is
16 that nor can Cooper's alleged insensitivity to Reuber's
17 career or reputation be the basis for recovery. And
18 there's limits to the lengths to which news organizations
19 can be expected to go to in protecting the sensibilities
20 of one side in the public debate. So this relates to the
21 malice standard and, I think, regardless of whether
22 Ms. Teter is a public figure or a limited purpose public
23 figure. It's that example.

24 The profit motive was another example of ways to
25 prove malice that were viewable that's not authorized.

1 In this case the defendants were asked how much they made
2 as a result of the videos. The suggestion being that
3 because -- that they chose to defame in order to have a
4 profit motive, to have a story that was going to be
5 interesting and that was going to be read. And Reuber
6 states precisely the opposite, and that if you can't --
7 it's very typical that news organizations are going to
8 publish stories that are going to be profit-based and
9 that that should not be a standard.

10 THE COURT: Again, just like I was talking about
11 with regard to one of the earlier matters. You have to
12 keep in mind that we're talking about the same body of
13 law that applies to the New York Times, and CBS, and
14 MSNBC, and Fox News. Can you imagine a defamation claim
15 against the New York Times where the representative of
16 the New York Times is asked, well, do you make a profit
17 by publishing your paper? Well of course they -- well I
18 don't know. Maybe the New York Times -- it's a
19 newspaper, and it probably doesn't make a profit anymore
20 but they try to.

21 Their objective is to make a profit. Does that
22 show malice? It's irrelevant to malice. It is not the
23 least bit probative of the question of malice. And it
24 seems to me as you go down this list -- it's been a while
25 since I read Reuber, but it seems to me that on this list

1 there are some things that are just not probative at all.
2 But there are other things that might be probative of
3 malice, if taken with other evidence, that the cumulative
4 effect would be a showing of malice and, you know,
5 insensitivity to the plaintiff may be part of that.

6 You know, even with a special purpose public
7 figure -- I'm not saying that Ms. Teter is. But even if
8 she is, as a purveyor of information, is simple
9 insensitivity to her reputation taken by itself enough to
10 prove malice? I think anybody with common sense would
11 say no. But when you take that element which has that
12 nugget of 401 relevance and you put it with a lot of
13 other things it might have a tendency to cumulatively
14 prove malice. It's that -- it's the same old 401
15 standard. If there is that nugget of probative value
16 then it comes in unless it gets kicked out under 403.
17 It's awfully hard for me to rule on a motion in limine
18 with regard to these because it has to do with the
19 context of the evidence as a whole.

20 MR. MONTECALVO: Your Honor, I think you're
21 sensitive to the issues that are going to be raised at
22 trial, and that's precisely the purpose of that motion in
23 limine. Thank you.

24 THE COURT: Mr. Sasser, do you have anything you
25 want to say on that point?

1 MR. SASSER: Yes, I do, Your Honor. The *Reuber*
2 case came out of the district of Maryland. It did
3 therefore not involve the North Carolina punitive damages
4 statute which goes through and categorizes a whole bunch
5 of things that are relevant to whether something
6 constitutes punitive damages. One of them is profit.
7 The very --

8 THE COURT: That has nothing to do with malice.

9 MR. SASSER: It has nothing to do with malice.

10 THE COURT: That's what their motion in limine is
11 about is the question of whether or not profit motive is
12 probative of malice. The answer is no. Does that mean
13 that profit motive or actual profit realized might be an
14 element of a claim for punitive damages is a completely
15 different question which I do not understand has been
16 presented to me.

17 MR. SASSER: I believe there's a rule, but I
18 can't remember the number of it, that says if a evidence
19 is admissible for any purpose then it comes in and the
20 court does with it as is appropriate. This evidence will
21 come in for punitive damages. The very things they're
22 saying that are covered by the *Reuber* case that aren't
23 malice, they're punitive damages. It's explicitly listed
24 by the North Carolina General Assembly in the punitive
25 damages statute the relation of the conduct and whether

1 there was likelihood of serious harm; the existence and
2 frequency of such conduct in the past; whether they
3 profited; their ability to pay punitive damages. All
4 those things are elements of punitive damages. It can't
5 come in for malice but it can come in for punitive
6 damages. I'm not sure where they get with their motion.

7 THE COURT: I don't know where they get it either.
8 They have posed a question to the Court about whether or
9 this can be excluded as evidence of malice. And if you
10 are presenting it as evidence of malice, it's excluded.
11 If you're presenting it for some other purpose it might
12 be admissible. You do raise a point -- and I don't want
13 to get caught off on a tangent here, but you do raise a
14 point as to whether as we often have with regard to
15 punitive damages claims.

16 Is there some evidence that is admissible only
17 with regard to punitives? If so, are we going to need to
18 bifurcate the trial and wait for the jury to come back?
19 And only if the jury comes back in favor of the plaintiff
20 then move on to that evidence? This was the -- I'm
21 surprised that it has taken us three and a half hours to
22 get here to the point that that issue has come up for the
23 first time, but at least it has as to this one issue.

24 Are there other issues like that to where we're
25 going to have to bifurcate the trial?

1 MR. DEAN: Your Honor, I think this *Reuber* type
2 evidence is the exact type of evidence because we have
3 two types of malice -- and that's what's confusing -- the
4 constitutional actual malice for defamation, and then
5 there's malice. And then there's the factors for
6 punitive damages. And what *Reuber* is addressing is what
7 the constitutional law is to be presented as relevant on
8 actual malice, and what the punitive damages statute
9 presents are the factors that our legislature thinks are
10 relevant to a punitive damages award.

11 So I do think we could bifurcate. And I don't
12 think it would be procedurally that difficult. One, all
13 this testimony is already "in the can," to borrow the
14 court's expression from earlier. I assume that most of
15 this would come in through direct examination of
16 Mr. O'Keefe, and so we know we can figure out exactly how
17 long that could take. It strikes me it's probably less
18 than a few hours of additional evidence.

19 On the flip side, the 403 concerns about this type
20 of evidence are, I think, substantial because we're not
21 just talking about profit motive and insensitivity to
22 Mrs. Teter. We're talking about what other types of
23 reports have you done in the past? Have you
24 misrepresented yourself to a North Carolinian in the
25 past? Have you ever been investigated by a state

1 attorney general? All of this other type of evidence.
2 We still have to talk about some of those may be relevant
3 on punitive damages, but they're certainly not relevant
4 on malice. And I think bifurcation is a reasonable,
5 practical solution that really shouldn't materially
6 lengthen this trial because the testimony is already in
7 the can.

8 THE COURT: Mr. Sasser.

9 MR. SASSER: Your Honor, some of those issues are
10 relevant to their recklessness; whether they have a
11 business model of reckless disregard for the truth. I
12 have not seen a motion to bifurcate yet. And I think as
13 it now stands if those things are relevant for any
14 purpose then they should come in in our case in chief.

15 THE COURT: Well I'm asking you the question as to
16 whether there is evidence that you are proposing to
17 elicit that is of any substantial quantum that goes only
18 to the questions related to punitives. Because if there
19 is then we have to bifurcate this trial. I don't care
20 whether there's been a motion or not. I'm not going to
21 allow you to pollute the jury with evidence that is not
22 relevant until they have reached a verdict in your favor.
23 That -- I mean that's normal. That's every case when you
24 have that sort of thing coming up. So my point is, are
25 we only talking about did you make a profit to this one

1 30-second blip of information? It sounds to me like
2 you're saying there's a whole lot more than that.

3 MR. SASSER: There's more than that. Did you
4 come to North Carolina and lie to elections officials
5 repeatedly? Did you lie to the Secretary of State about
6 whether your CEO is a convicted criminal? Those sorts of
7 things. There's not that long of a period of time, but
8 there's several different elements.

9 THE COURT: Well, I mean, I think you've told me
10 then that we probably need to bifurcate this trial, and
11 we -- any evidence that is relevant only to the questions
12 of punitives, including the availability of punitives --
13 in other words, the other type of malice will go after a
14 verdict if there's a verdict for the plaintiff.

15 MR. SASSER: Thank you, Your Honor.

16 THE COURT: These last two pertain to the
17 plaintiff's other projects and other investigations.
18 Mr. Sasser, is that what you were referring to with
19 regard to some of this other evidence on punitives?

20 MR. SASSER: That's correct. And also to prove
21 reckless recklessness and that they -- that they have a
22 business model of coming out and doing the same thing
23 over and over. That they -- it makes it more likely they
24 were reckless if they had done this in the past.

25 THE COURT: How does that come within 404(b),

1 prior bad acts? They were bad before so therefore they
2 must be bad again? It says it doesn't come in unless you
3 can use it to prove some other element.

4 MR. SASSER: As Your Honor knows from criminal
5 cases there's always some other element.

6 THE COURT: Yeah, but you've got to be able to
7 articulate what it is.

8 MR. SASSER: Motive, intent, plan, modus
9 operandi. They've said what their modus operandi was.
10 Mr. O'Keefe asked him if he did usually use hidden
11 cameras, and he goes yeah that's our modus operandi. But
12 what they do their recklessness here is -- and lack of
13 accident --

14 THE COURT: What are you proposing to ask them?
15 In other words, are you planning to ask the defendant, or
16 somebody on behalf of the defendant, you know, isn't it
17 true that you've used hidden cameras in projects before?

18 MR. SASSER: More than that, Your Honor.

19 THE COURT: Well how much more than that?

20 MR. SASSER: I asked Mr. O'Keefe -- and this is
21 in the first ten minutes of his deposition. If you look
22 at the few first few pages of the transcript: Did you
23 come to North Carolina and lie to elections officials?
24 Not really. Okay. Is this you in a video saying your
25 name is somebody other than "James O'Keefe" to an

1 official at a polling place? Well, yeah, that's me. And
2 did you do this? And did you tell people -- did you tell
3 the world that two people from North Carolina were lying
4 about being United States citizens when they were not?
5 He's just, yeah, trying to -- he had to apologize for
6 that. He did that too. Those kind of things.

7 And the stuff about the Secretary of State is very
8 short. We haven't gotten into the issue about his
9 criminal conviction. But those are the kind of things --
10 and I think the criminal conviction goes to his
11 credibility. And there is -- I don't think there's a
12 motion in limine on that.

13 THE COURT: Well, I mean, that -- that's something
14 very different from what I understood to be the motion in
15 limine. Obviously, where you're directly attacking the
16 credibility of a defendant with regard to specific acts
17 -- I mean that's Rule 609. How are you coming within
18 Rule 609?

19 THE COURT: Particularly the way that you were
20 just describing how you apparently did it in the
21 deposition. I don't know how you're going to do it at
22 trial, but extrinsic evidence is not admissible to prove
23 specific instances of a witness's conduct in order to
24 attack or support the witness's character for
25 truthfulness. But the Court may, on cross-examination,

1 allow them to be inquired into if they are probative of
2 the character, et cetera.

3 MR. SASSER: It was cross-examination, Your
4 Honor.

5 THE COURT: Okay. But I thought you were talking
6 about playing a video to bring in extrinsic evidence.

7 MR. SASSER: The video of his deposition.

8 THE COURT: Okay. That's not what I thought you
9 were saying.

10 MR. SASSER: I'm sorry. There was another thing,
11 too. You're not confused. I was also talking about a
12 video of him accusing North Carolina citizens of being
13 not United States citizens inaccurately. That does sound
14 like a prior act.

15 THE COURT: Well.

16 MR. SASSER: I need to look at that.

17 THE COURT: I think even though it's not an issue,
18 with regard to these motions in limine on the issue that
19 you have raised, I think the majority of the answers to
20 your questions are in Rule 609 or in 404(b).

21 MR. SASSER: There may well be -- those issues
22 may well be in the deposition designations for,
23 unfortunately, Your Honor's consideration.

24 THE COURT: Okay. I thought we were talking about
25 Mr. O'Keefe. Is Mr. O'Keefe not going to be present for

1 the trial?

2 MR. SASSER: I don't know. I was planning to use
3 his deposition as a statement of a party.

4 THE COURT: Okay. So using a party deposition
5 under Rule 32?

6 MR. SASSER: Yes, sir.

7 THE COURT: Okay.

8 MR. DEAN: Your Honor, one question about that
9 based on the exchange that just occurred. This is not
10 cross-examination. These were Mr. Sasser's first
11 questions in his deposition. So when we're looking at
12 this from a Rule 609 perspective, we haven't treated any
13 of this as cross-examination. If they're putting in
14 Mr. O'Keefe as part of their examination, or as part of
15 their case in chief, and that's their direct, is Your
16 Honor saying that you believe it is cross-examination?

17 THE COURT: I have no idea. I haven't read the
18 deposition.

19 MR. DEAN: All right. I wanted to make sure --
20 from that interaction I think the deposition speaks for
21 itself on that point.

22 THE COURT: Okay. All I was going on is
23 Mr. Sasser said it was on cross-examination. I took that
24 at face value.

25 MR. SASSER: Your Honor, that's what I meant by

1 questions I asked him in his deposition. I was referring
2 to that as cross-examination. I was not offering
3 extrinsic evidence of any of those things. For example,
4 the criminal conviction. I asked him about it, and he
5 answered I'm not trying to bring anything in to show that
6 that happened since he admitted it.

7 THE COURT: But here is where I'm confused.
8 Mr. Dean, if I'm understanding him correctly, is saying
9 this wasn't cross-examination. This is right at the
10 beginning of your direct examination of Mr. O'Keefe when
11 you noticed up his deposition and took his deposition,
12 apparently for the purposes of preserving it for trial,
13 at least as a Rule 32 deposition. Is that
14 cross-examination under 609?

15 MR. SASSER: I think it is, Your Honor.

16 THE COURT: Because you pulled that out of your
17 ear, or you have a case that says that?

18 MR. SASSER: Because I'm not offering extrinsic
19 evidence. It's questioning the witness. It's not
20 questioning somebody that --

21 THE COURT: There's a non sequitur there. You're
22 saying it's not cross-examination because you're not
23 offering extrinsic evidence.

24 MR. SASSER: I'm sorry. It is cross-examination
25 under Rule 609 because I'm not offering extrinsic

1 evidence.

2 THE COURT: Extrinsic evidence is not admissible.

3 MR. SASSER: Yes, sir.

4 THE COURT: To challenge -- let me just read you
5 the rule, because you -- I think you've taken the rule
6 and turned it on its head. Extrinsic evidence is not
7 admissible to prove specific incidents of a witness's
8 conduct in order to attack or support the witness's
9 character for truthfulness. Period. But the court may,
10 on cross-examination, allow them to be inquired into if
11 they are probative of the character for truthfulness, et
12 cetera.

13 So you can do it without extrinsic evidence on
14 cross-examination. So was this on cross-examination?
15 Because if it's not on cross-examination you can't do it.

16 MR. SASSER: Your Honor, I consider it
17 cross-examination when I'm deposing somebody on the other
18 side not questioning my own witness. That's my
19 understanding of what cross-examination means.

20 THE COURT: Well you might want to find a case
21 that interprets Rule 609 that way because I don't know
22 what the answer is. But it's an interesting question.

23 MR. SASSER: 608, Your Honor. Is it 608 or 609?

24 THE COURT: 609 is what I'm talking about.

25 MR. DEAN: Your Honor, I think 611 is the mode

1 and operation of testimony. Then it talks about the
2 scope of cross-examination should not go on beyond
3 subject matter direct examination. I mean I don't know a
4 person in the country -- a lawyer who says that you can
5 cross someone who hasn't been directed. And if that's
6 the case then you could call an adverse party and just
7 lead them all the way through your case in chief and go
8 on home.

9 I mean Mr. Sasser asked the first questions and,
10 in terms of the deposition, I was the one doing the cross
11 examining. But Mr. Sasser asked these questions right
12 out of the gate in his deposition of Mr. O'Keefe. That
13 was the direct examination. He wasn't crossing anything
14 because he wasn't asking Mr. O'Keefe about direct
15 examination testimony that Mr. O'Keefe had given.

16 THE COURT: Yeah. If you-all have some case law
17 on the interpretation of 609 on this point I'd be glad to
18 read it, but -- and you know you can call an adverse
19 witness, but that's not what we're talking about here.
20 Because as far as I know Mr. O'Keefe is a defendant and
21 he's going to be here.

22 We're talking about the use of this deposition as
23 a Rule 32 deposition. Therefore, you know, you look at
24 the face of the deposition. What is direct examination?
25 What is cross-examination? And if this is right in the

1 first five minutes of that deposition I have trouble
2 seeing it as cross-examination. Now if Mr. O'Keefe shows
3 up and he testifies, or if you call him as an adverse
4 witness, it might be a different matter.

5 MR. SASSER: Your Honor, I'll read the rest of
6 Rule 611(b) that Mr. Dean just mentioned. Cross-
7 examination should not go beyond the subject matter of
8 the direct examination, a matter affecting the witness's
9 credibility. So that's -- I was going to his credibility
10 on that. But I will research that rule and we may, if
11 it's permissible, have the parties submit some -- at
12 least a case that will give you some guidance with regard
13 to the deposition designations.

14 THE COURT: Please go ahead and submit anything
15 like that. Please don't make it lengthy. Just simply
16 giving a citation to a case or a paragraph quote from a
17 case with the citation so that we can look it up, and
18 I'll read that. I have to say that -- I generally feel
19 like I know the Rules of Evidence, but that's an issue
20 that I don't remember ever coming up. Maybe it should
21 have before.

22 I've come to the end of my notes on the motions in
23 limine. Is there anything else that we need to talk
24 about?

25 MR. SASSER: Your Honor, is there a filing due on

1 Friday of next week, like the exhibits, perhaps? I was
2 trying to --

3 THE COURT: By the middle of the day on the Friday
4 before jury selection you have to file your witness
5 lists. And I don't remember exactly what your case
6 management order says, but I want you to file your
7 exhibit lists as well.

8 MR. SASSER: So we can do that electronically.
9 There's not going to be anybody, I understand, in the
10 clerk's office, but we can do that electronically.

11 THE COURT: Right. You should be able to file
12 that in the ECF system. That shouldn't be a problem.

13 MR. SASSER: And there may be things that could
14 not be filed electronically, such as a video or something
15 like that, and we would FedEx it and the clerk will get
16 it Monday morning I assume.

17 THE COURT: Well like what? Tell me what you have
18 in mind here because we're going to have to work around
19 this.

20 MR. SASSER: I have nothing in mind, Your Honor.
21 There have been situations in the case where we've had to
22 file things that could not be filed electronically.

23 THE COURT: Yeah. I can't think of any last
24 minute filings of that nature --

25 MR. SASSER: All right.

1 THE COURT: -- that you would have right before a
2 trial. Because it's not like a summary judgment motion
3 or opposition to a summary judgment or something like
4 that where you have video exhibits and all these things
5 that are nonreproducible. The main things you're doing
6 at the last minute are going to be documentary in nature.
7 It's going to be witness lists, it's going to be exhibit
8 lists; it might be some additional exhibits sometimes.
9 Please don't drop another 1,700 pages of depositions on
10 me.

11 Okay. Any other issues or any other things that
12 we need to address? Anything that we can do today that
13 will save us time on May the 20th?

14 MR. SASSER: Do you want us to continue to try to
15 modify deposition designations, taking into advice what
16 we've heard about motions in limine, and try to get you
17 something some time next week?

18 THE COURT: The sooner the better. Yeah. And I
19 would hope -- even though I haven't had a chance to look
20 at your designations yet I would hope that the
21 discussions that we've had on the motions in limine will
22 be limiting your objections as well as your designations
23 considerably. I have to admit, ordinarily for a trial
24 the designations and objections for depositions to be
25 used at trial is something that I can dispose of in half

1 an hour. It usually is not very involved at all. It's a
2 handful of questions.

3 I was utterly stunned when I got 1,700 pages of
4 transcript along with page after page after page of
5 designations and objections. It just -- my initial
6 reaction was come on guys read the rules of evidence.
7 But, you know, maybe it's more complex than that. Don't
8 take that as a criticism. That was just my initial
9 reaction.

10 My law clerk is reminding me of sort of a
11 logistical problem that we have with regard to the 1,700
12 pages that you have submitted. You've submitted them
13 only in electronic format which presents a real problem
14 for me because I need it on paper. And I would need --
15 in fact, if you could do it before you leave town. Do it
16 this afternoon. Get us those 1,700 pages with the
17 designations, with the objections highlighted the way you
18 have done electronically. Get them to us in hard copy
19 this afternoon and that would be a tremendous help. And
20 then if you can limit it further next week that would be
21 great, but at least that sure helps.

22 MR. SASSER: Does Your Honor mind front and back
23 copy? Because I've got it right there.

24 THE COURT: That's fine. So long as it's on
25 paper. Are these on the condensed transcripts like the

1 little bitty pages?

2 MS. RINI: Two on one page.

3 MR. SASSER: Quasi-condensed.

4 THE COURT: Yeah. That's better than what I have
5 right now. I'll get out my magnifying glass. Thank you.

6 MR. MONTECALVO: Your Honor, can I take a shot at
7 limiting it a little bit further?

8 THE COURT: Say again.

9 MR. MONTECALVO: Can I take a shot at limiting
10 the designations a little bit further?

11 THE COURT: If it's going to save us time or help
12 us, I'm very open to that.

13 MR. MONTECALVO: We had a general objection on
14 the use of one of the transcripts in its entirety, and
15 that's the transcript of Ms. Comerford from November
16 2018. We took Ms. Comerford's deposition in 2018 within
17 the discovery period. And then last month -- last month
18 we took the de bene esse deposition of Ms. Comerford in a
19 much more condensed format that ended up being two hours.

20 By stipulation, we got an hour and the plaintiff
21 got an hour. We designated on that second transcript,
22 and we were surprised to get a designation on the first
23 transcript from the plaintiff which caused us, then, to
24 counter designate on the first transcript as well. We
25 don't -- under Rule 32, we think that only the second

1 transcript should be the one that is presented into trial
2 because it was the de bene esse deposition transcript.

3 THE COURT: Well I'm not understanding where
4 you're getting that out of Rule 32. What provision are
5 you relying on?

6 MR. MONTECALVO: Well she actually was available
7 at the trial through that deposition that we took last
8 month. And because we asked the questions and primarily
9 very similar questions than what when he we had asked at
10 the longer deposition in November, based on the
11 unavailability -- based on the availability of her that
12 we were presenting her through that deposition
13 transcript, it didn't seem appropriate to go back to an
14 earlier transcript and also designate that.

15 So what the jury is going to end up getting are
16 two transcripts from Ms. Comerford that deal with,
17 primarily, the same subject matter. I can't point to a
18 specific portion in the rule that relates to this
19 specific instance.

20 THE COURT: Is the de bene esse deposition done on
21 video?

22 MR. MONTECALVO: It was.

23 THE COURT: Was the earlier one done within on
24 video?

25 MR. MONTECALVO: It was not.

1 THE COURT: Okay. Well what we'll have here, if I
2 understand what is being proposed, is there will be a
3 video deposition of Ms. Comerford played for the jury
4 that includes direct and cross-examination, and that will
5 be followed by a short addendum to that where you do it
6 the old-fashioned way and somebody sits in the chair and
7 asks the questions and somebody sits in the witness stand
8 and reads the answers from the earlier deposition.

9 MR. MONTECALVO: Okay. Thank you, Your Honor.

10 THE COURT: I mean if there's something in
11 particular that you want to point to in Rule 32 that says
12 once you take a de bene esse deposition the older
13 deposition no longer counts it's no longer within the
14 rule I'll look at it, but I've never heard that before.

15 MR. MONTECALVO: Well I don't think we've -- I've
16 seen that situation come up. At the very least, it seems
17 like it would be cumulative under 403 to have a lot of
18 the same questions.

19 THE COURT: Cumulative evidence is still not
20 admissible. So, in other words, if it is the videotape
21 that has Ms. Comerford saying A, B and C, and then
22 reading from the witness stand Ms. Comerford again saying
23 A and B, that will probably be excluded. It's got to be
24 new information. To state the obvious: When you have
25 depositions read to the jury from the witness stand the

1 old-fashioned way, jurors hate that because they don't
2 see the witness. They don't have the opportunity to
3 determine the credibility of the witness. You put them
4 to sleep. All of the earmarks of poor presentation are
5 in that kind of a deposition. So unless you have more
6 than just a few lines from it it's not prohibitive but it
7 sure is a bad idea.

8 MR. SASSER: Your Honor, with regard to one other
9 deposition. We would like you to completely disregard
10 the one of Ruth Smith. We designated it because she was
11 a party opponent at one point. We're withdrawing that,
12 so you do not need to go through anything involving that.

13 THE COURT: Okay. You say she was a party
14 opponent. She was --

15 MR. SASSER: She was deposed. She was
16 representing her father Mr. Campbell.

17 THE COURT: Okay. She wasn't a party opponent,
18 was she?

19 MR. SASSER: No, sir, she was a representative
20 for him.

21 THE COURT: Okay. Anything else? Anything that
22 might save us some time or that will streamline things if
23 we address it now?

24 MR. SASSER: Any predictions on the ruling on the
25 per se/per quod issue? Timing on that?

1 THE COURT: As soon as I can get to it.

2 MR. SASSER: All right. That sounds great.

3 THE COURT: The more you load me up with
4 deposition designations the longer it will take.

5 MR. SASSER: Will it help if we were to limit it
6 to the depositions transcripts we were using for the case
7 in chief rather than punitives? We've already designated
8 it both ways, and I'm sure Your Honor can flip through
9 and tell what's punitive and what's not.

10 THE COURT: Well I tell you what would be helpful
11 for updating your designations and objections one
12 deposition at a time rather than waiting until you have
13 all of it done and unload it on us at one time. When you
14 have one of them done, provide that information, you
15 know, by filing it. But also email it to Ms. Ritter so
16 that we can take that up and take a look at that.

17 MR. SASSER: Yes, sir, we will do that.

18 THE COURT: I fear we are going to be spending our
19 weekend on that.

20 MR. SASSER: I'm sorry.

21 THE COURT: Even if you're sending it to us on a
22 Saturday afternoon that will probably be helpful.

23 MR. SASSER: Thank you, Your Honor.

24 THE COURT: Okay. Anything else?

25 MR. DEAN: Judge? I'm sorry, Your Honor.

1 THE COURT: Go ahead, Mr. Dean.

2 MR. DEAN: Mr. Montecalvo and I didn't hear the
3 same thing. You want us to submit depositions as they
4 are done in their entirety. So Mr. O'Keefe's
5 designations from their side, our counter designations
6 and objections, their counter counter designations, and
7 then submit that one deposition. Is that what you said,
8 Your Honor, you'd like us to do?

9 THE COURT: It would be helpful for you to do
10 that. And do that one after another as opposed to
11 waiting until you have all of them finished and then
12 unloading all of them on us on, say, Wednesday of next
13 week. I'd rather get one this afternoon, one tomorrow
14 afternoon, one Sunday afternoon, and three on Monday,
15 than to get all of them on Wednesday.

16 MR. DEAN: Understood. Thank you. That
17 clarifies it. Thank you.

18 THE COURT: Okay. Anything else? All right.
19 Well I appreciate all your hard work and all your
20 preparation in this, and I'm sure you're looking forward
21 to everything you're going to be doing for the next three
22 weeks which will be this case and nothing else.

23 With that, marshal, please recess us until further
24 call.

25 (Off the record at 1:00 p.m.)

CERTIFICATE

I, Tracy Rae Dunlap, RMR, CRR, an Official Court Reporter for the United States District Court for the Western District of North Carolina, do hereby certify that I transcribed, by machine shorthand, the proceedings had in the case of SHIRLEY TETER versus PROJECT VERITAS ACTION FUND, et al, Civil Action Number 1:17-CV-256, on May 3, 2019.

In witness whereof, I have hereto subscribed my name, this 7th day of May 2019.

__/S/__Tracy Rae Dunlap__
TRACY RAE DUNLAP, RMR, CRR
OFFICIAL COURT REPORTER